THE UNITED NATIONS SECURITY COUNCIL
DRAWING A LINE IN THE SAND

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I. INTRODUCTION

In the years since the end of the "cold war" there has been a significant increase in the willingness of the Security Council to pass resolutions authorising the use of force, both military and economic, to achieve compliance with its demands. The Security Council has, by its actions, extended its power into fields which were not previously considered within its proper domain. Perhaps because of the failure of the Security Council to act in situations where there did exist threats to world peace in the past, little attention was devoted in the first forty years of its existence to the limits and legitimacy of the exercise of the powers of the Security Council.

However, in the face of the Council's continuing expansion into new fields of interest, the issue of limitation of Security Council powers has gained importance. This article, presented in five main parts, will propose that the Security Council is bound by a primary obligation owed to the member states of the United Nations to limit its actions to a defined sphere. The article will suggest that additional control mechanisms are required to ensure substantial compliance with this normative limitation.

First, the article will discuss the development of the Security Council and its current structure. It will look briefly at the predecessors of the Security Council, and note the forces that shaped their success or failure. Secondly, the article will consider the question of whether there can or should exist any limits on the powers of the Security Council set out in Chapter VII of the United Nations Charter. As a result of that consideration, the article will propose the existence of a fundamental limitation, beyond which actions of the Security Council cease to be legitimate. Thirdly, the article will choose several of the resolutions of the Security Council taken under Chapter VII of the Charter since 1990 as case studies which demonstrate the potential

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for the Security Council to act in ways that go beyond the proposed objective limitation. Fourthly, the article will review the existing internal and external mechanisms of accountability and the possibilities of external accountability to some other body. The role of the International Court of Justice will be considered in this light. Finally, the conclusion will consider the current proposals for reform and suggest some additional structural reforms which take into account both current political realities and the learning of the last fifty years.

II. HISTORY OF COLLECTIVE SECURITY

The Development of the Security Council

The Security Council has its direct origins in the negotiations that took place in the latter stages of World War II at Dumbarton Oaks, Yalta and San Francisco,[1] culminating in 1945 with the drafting of the United Nations Charter. The Charter created a system of collective security; a system in which a threat to the security of one member of the United Nations was deemed a threat to other members. The Security Council is the most recent attempt to initiate such a system in the western international community. There had been many previous structures that had the purported aim of preserving the security of Europe by means of collective security.[2]

The history of collective security is linked inextricably to the concept of the state[3] as the fundamental actor in the international system.[4] The rise of the

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[1] For a brief account of the negotiations see Sonnenfeld R, Resolutions of the United Nations Security Council (1988, Martinus Nijhoff Publishers, Dordrecht) 39-44.

[2] Roberts A and anor, United Nations, Divided World (second edition, 1993, Clarendon Press, Oxford) 30.

[3] Usually defined in terms of Article I of the 1933 Montevideo Convention on Rights and Duties of States: "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States."

[4] For discussions of the role of the state in international law, see Allott P, Eunomia: a New Order for a New World (1990, Oxford University Press, Oxford) 309; Koskenniemi, "The future of statehood" (1991) 32 Harvard International Law Journal 397, 402-404.

state-centered system of international relations and international law brought with it the concept of institutionalised warfare on nationalistic grounds. The technological advances at the end of the nineteenth century greatly increased the scale and devastation of war, which led to attempts to bring about lasting peace.

One of the earliest responses to total warfare was the Treaty constituting the Peace of Westphalia which formally ended the Thirty Years War in central Europe.[5] The Treaty which was concluded in 1648, provided in Article 123 that disputes between parties to the Treaty were to be put before a "friendly composition".[6] If after three years the conflict continued notwithstanding the efforts of the composition, the other parties to the Treaty were obliged to join with the injured party to use force to repel the injury. This provision was never relied upon to "repel force".[7] Although the period between 1648 and the turn of the century was peaceful in comparison with the preceding years, it cannot be said that the region was one in which peace and security were secured.[8] Nevertheless, the Treaty of Westphalia attempted to formalise the relationship between the community of separate state entities.[9]

Implementation of the security procedures was hindered by the lack of *bona fides* amongst the signatories to the Treaty. Rather than placing trust in the system they had agreed to, the monarchs developed a complicated system of secret and open alliances, and turned to threats and aggression in place of

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[5] The War and its effects are described in Carsten FL (ed), The New Cambridge Modern History (1961, Cambridge University Press, Cambridge) Volume V at 20, 21.

[6] Mowat R, A History of European Diplomacy 1451-1789 (1928, Edward Arnold & Co, London) 113.

[7] Cassese A, International Law in a Divided World (1986, Clarendon Press, Oxford) 43.

[8] Fighting took place between Sweden and Poland in 1655, in the Spanish Netherlands in 1667 and French aggression under Louis XIV caused severe suffering after 1672: Carsten note 5 at 21.

[9] Falk R, Revitalizing International Law (1989, Iowa State University Press, Ames) 17-18.

peaceful arbitration through a third party.[10] It was felt by the powerful state parties to the treaty that its security provisions did not reflect their best interests, and they continued to rely on armed force whenever it was deemed appropriate.[11]

A separate proposal was put forward by the Abbe de Saint-Pierre in 1713 in his *Projet de Paix Perpetuelle.*[12] He suggested a Congress of representatives of sovereign nations who would have the power to act as arbitrators or judges over disputes between nations.[13] The Congress was to have the power to 'ban' a nation, and could order other nations to use force, at common expense, to make the banned nation submit to the Congress.[14] His proposal was received with derision in that "age of Machiavellian statecraft"[15] and was never implemented. It did, however, help to sow the seeds of a future system of collective security.

In 1804, Alexander I of Russia proposed a "peace project" whereby parties to a dispute would be required to use peaceful options such as mediation prior to resolving a conflict by force. A failure to comply would enable other members of his proposed "union" to use force against the wayward member.[16] The aim was to provide a mutual guarantee of security by way of treaty.

His suggestion was developed at the Congress of Aix-La-Chapelle in 1818, which included amongst its proposals a system of mutual security under

[10] Verosta, "History of the law of nations" in Bernhardt R (ed), Encyclopedia of Public International Law (1981, North Holland, Amsterdam) Volume 7 at 162, 168.

[11] Cassese note 7 at 44.

[12] de Saint-Pierre, "Projet de Traite Pour Rendre La Paix Perpetuelle" in Rosseau J, Extrait du Projet de Paix Perpetuelle de M. l'Abbe de Saint-Pierre (1761, M Rey, Amsterdam).

[13] Phillips R, The Confederation of Europe (1920, Green and Co, London) 24.

[14] Ibid.

[15] Ibid at 27.

[16] Ibid at 37.

which each European nation would come to the defence of another, building upon the earlier expressions of this concept.[17] Cassese cites two instances in which this system was implemented,[18] but both involved assistance lent to an incumbent government in the face of internal revolutionary movements, rather than the envisaged external aggression. The rise of formalised self-interest[19] and the explicit reliance on the theory of the balance of power ensured that the specific provisions of the Congress would never be used as intended. Nations continued to conduct their affairs in accordance with the principles of military power and nationalism.[20]

During the latter half of the nineteenth century there was a marked increase in the number of inter-state institutions such as the Danube Commission of 1858 and the Universal Postal Union of 1874. They were a function of the rapid developments in transport and communications, together with the consequential rise in inter-state commerce and trade.[21] Although having no direct relevance to the concept of world peace, the success of these organisations highlighted the possibilities of international organisations as a mechanism for dealing with issues that transcended state boundaries, and therefore contributed to the collective "consciousness" of the international community.[22]

The two Hague Peace Conferences of 1899 and 1907 are important in many respects, particularly in relation to the development of international arbitral and judicial systems. However, they did not make any practical contribution to the prevention of international conflict by way of collective security.[23]

[17] Verosta note 10 at 8.

[18] Cassese note 7 at 45.

[19] Such as the Monroe Doctrine.

[20] Walters F, A History of the League of Nations (1952, Oxford University Press, London) Volume I at 6.

[21] Ibid at 7.

[22] The concept of the consciousness of the international community is described by Allott: see note 4 at 262.

[23] Walters note 20 at 13.

The creation of the League of Nations following World War I, inspired by the words of President Wilson of the United States,[24] was in many respects the direct forerunner of the United Nations. As with the United Nations, the stated primary goal was the maintenance of international peace and security.[25] To achieve this goal, the Covenant of the League of Nations provided for a Council which would maintain peace and security by a system of arbitration followed by enforcement.[26] The security of borders was protected by a prohibition on aggression[27] which was combined with the obligation to settle disputes peacefully.[28] If a Member failed to comply with its obligations under the Covenant, including compliance with rulings of the Council, "it would be deemed to have committed an act of war against all other Members of the League".[29] Article 16 further provided for a system of sanctions which was to be implemented against states in breach of their Covenant obligations. It included provision for the Council to make recommendations to the other states as to their military contributions to the "armed force to be used to protect the covenants of the League".[30]

History records that the League of Nations did not succeed in its main purpose. One reason was the attitude of members, in particular the most powerful member states who viewed the League of Nations as unnecessary or a hindrance to the furtherance of their foreign policies.[31] Other reasons include the failure of the disarmament provisions and non-participation by

[24] Bowett D, The Law of International Institutions (fourth edition, 1982, Stevens, London) 17.

[25] Preamble, 1919 Covenant of the League of Nations ("Covenant").

[26] Covenant Articles 11-13.

[27] Covenant Article 10.

[28] Covenant Article 12.

[29] Covenant Article 16.

[30] Covenant Article 16(2).

[31] See Bowett note 24 at 21.

significant states, initially the United States, and later Japan, Germany and Italy. Rather than being viewed as failures, it is important to place each of these early attempts within the context of an embryonic international legal system and a tradition of armed force and territorial conquest.[32] Without a simultaneous and widely agreed ban on the use of force in international affairs, at least between the main participants who would necessarily be responsible for enforcing the "rules", any system of collective security was doomed to failure. In each case, the lack of *bona fides* amongst participant states, and the absence of any system of legal control contributed to their downfall. In other words, the lack of objectivity that characterised the systems in each case played a major role in causing their downfall.

Any collective security system requires the co-operation of the powerful states. However, that should not preclude reliance on objective standards. Without formal legal restraint or accountability, it is unlikely that a mechanism based upon political balances between powerful nations to restrain abuses of the system will succeed in its goal of ensuring long term international peace.

The Security Council

It was in this context that the United Nations system was developed in the latter stages of World War II. The structure differs from the League of Nations in several ways. One of the important developments was the creation of the Security Council as an institution empowered both to decide questions relating to threats to international peace and also to authorise and undertake enforcement action in accordance with its decisions. This power was held by the Security Council to the exclusion of the other main political organ, the General Assembly.[33] By concentrating this power in the smaller

[32] Rajan notes the contribution of the League of Nations to the development of collective security: see Rajan M, United Nations and Domestic Jurisdiction (second edition, 1961, Asia Publishing House, London) 29.

[33] United Nations Charter Article 12(1); the General Assembly purported to create a limited role in cases where the Security Council abrogated its primary responsibility by virtue of the Uniting for Peace Resolution, namely, General Assembly Resolution 377 (1950); see Bowett note 24 at 50 and the Advisory Opinion on Certain Expenses of the United Nations (Article 17 paragraph 2 of the Charter) [1962] International Court of Justice Reports 151, 163 ("Certain Expenses case").

Security Council, it was made more likely that effective action would be possible. The strength of this theory is still appreciated today.[34]

The Security Council consists of fifteen members of the United Nations, of which five (China, United Kingdom, Russia, France and United States) are permanent members.[35] The remaining ten members of the Security Council are elected for a period of two years by the General Assembly.[36] Voting procedure in the Security Council is set out in Article 27(3) of the Charter. That provision provides that a resolution of the Security Council on a non-procedural matter[37] requires "an affirmative vote of nine members, including the concurring votes of the permanent members". If the decision is "under Chapter VI" a party to the relevant dispute who is also a member of the Security Council may not vote.

The requirement for the concurring vote of each permanent member is the basis for the "veto" held by those members. The words of Article 27(3) have been interpreted by the members themselves,[38] (and confirmed by the International Court of Justice[39]) to be satisfied whenever a permanent member does not vote against a resolution, even if the permanent member abstains from voting. Thus, in practice, a permanent member may choose to

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[34] General Assembly Press Release of 13 October 1994, GA/8753 at 1; Caron, "The legitimacy of the collective authority of the Security Council" (1993) 87 American Journal of International Law 552, 588.

[35] United Nations Charter Article 23(1).

[36] United Nations Charter Article 23(2).

[37] There is some debate over the definition of a "procedural matter" and in particular over the right claimed by the permanent members to exercise the power of veto in determining that question, thus giving rise to the "double veto"; see Bailey S, The Procedure of the UN Security Council (second edition, 1988, Clarendon Press, Oxford) 214.

[38] Ibid at 225; see Stavropoulos, "The practice of voluntary abstentions by permanent members of the Security Council" (1967) 61 American Journal of International Law 737, 743.

[39] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Order of 29 January 1971 [1971] International Court of Justice Reports 12, 22 ("Namibia opinion").

vote in favour of a draft resolution, and contribute towards the required nine affirmative votes; or it may abstain from voting, or vote against the resolution. If it is the latter case the veto will be exercised and the resolution will fail, notwithstanding the number of positive votes it may attract.

Non-permanent members also have the ability to vote in favour, against or abstain from voting on a resolution. However, in their case, there is no practical distinction between voting against a resolution or abstaining from voting, since in either case they will not be counted towards the required nine affirmative votes. The casting of a negative vote by a non-permanent member will only be declaratory of the member's strong disagreement with the draft resolution. The role of the Security Council in the United Nations system is set out in Article 24 which provides that the members agree that the Security Council has:

> primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

The Security Council is delegated wide powers by the body of members of the United Nations. In Article 25, the members of the United Nations agree "to accept and carry out the decisions of the Security Council in accordance with the present Charter". Further, the members agree to give "mutual assistance" in carrying out resolutions of the Security Council.[40] The specific powers of the Security Council are set out in Chapter VI (pacific settlement of disputes), Chapter VII (action with respect to threats to the peace, breaches of the peace and acts of aggression) and Chapter VIII (linking the Security Council with regional organisations of security).

The discussion in this article will focus primarily on Articles 39, 40, 41, 42 and 43 in Chapter VII, which broadly deal with the powers of the Security Council to "determine the existence of any threat to the peace, breach of the peace or act of aggression"[41] and respond to such a determination. Once a finding under Article 39 is made, the Security Council may take provisional measures under Article 40, call for "interruption of economic relations"

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[40] United Nations Charter Article 49.

[41] United Nations Charter Article 39.

together with severance of communication and transport links under Article 41; or, if the measures in Articles 40 and 41 are considered by the Security Council to be inadequate, take "such action by air sea or land forces as may be necessary to maintain or restore international peace and security."[42]

III. LIMITS TO SECURITY COUNCIL POWERS

Should there be Limits to Chapter VII Powers?

There are few provisions of the Charter which guide the exercise by the Security Council of its power to make resolutions that directly impact upon world affairs. This is not necessarily a failing. It may be that implied conventions impose sufficient accountability, or indeed that no formal accountability should be imposed. Recent Chapter VII resolutions have caused some commentators to call for judicial review of Security Council decisions.[43] The commentators' implicit assumption is that the Security Council's work is in fact subject to some objective principle of accountability or legitimacy. This discussion tests the accuracy of that assumption.

Members of the United Nations expressly cede to the Security Council the power and responsibility to maintain international peace and security.[44] The Security Council is entitled, by virtue of Article 2(7), to override the principle of non-intervention when it is dealing with a matter under Chapter VII of the Charter. Chapter VII resolutions regulate the conduct of Member states, taking absolute priority over all other international agreements[45] and thus have a quasi-legislative effect upon the international community.

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[42] United Nations Charter Article 42.

[43] For example see Graefrath, "Leave to the court what belongs to the court: The Libyan Case" (1993) 4 European Journal of International Law 184-205; Watson, "Constitutionalism, judicial review and the World Court" (1993) 34 Harvard International Law Journal 1; Franck T, The Power of Legitimacy Among Nations (1990, Oxford University Press, Oxford) 110.

[44] United Nations Charter Article 24.

[45] United Nations Charter Article 103; Libyan Jamahiriya v United States of America [1992] International Court of Justice Reports 3, 14.

Positivist theory defines legislative power in terms of the exercise by a sovereign of the power to make rules which are binding on the sovereign's subjects.[46] The applicability of classical positivist theory to the global system of international law generally is questionable.[47] However, without denying the validity of those criticisms, where rules are in fact made by a "sovereign" body (namely, sovereign in the sense of having the ability to issue orders in a defined field without interference from other bodies), positivist theory may usefully be applied.[48]

Both Hart and Kelsen searched for sources of law, whereas Hart viewed the legal system as a combined system of primary rules (rules of behaviour) and secondary rules (rules of adjudication, application and change).[49] This rationale had the advantage of being independent of any system of sanctions.[50] Kelsen considered all rules to be linked to a "basic norm" from which could be derived the answer to why a population was under an obligation to obey certain rules.[51] Hart considered Kelsen's basic norm to be nothing more than a rule of recognition.[52] This theme has been continued by the work of Franck, who proposes that legitimacy and fairness are relevant factors which determine the validity of rules.[53] Each analysis involves a recognition that the mere issuance of "rules" by a sovereign alone is not sufficient to oblige subjects to obey those rules. Instead, the question becomes the following:

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[46] For example see Austin J, The Province of Jurisprudence Determined (1954, Weidenfeld and Nicolson, London) 13.

[47] See Reisman, "The view from the New Haven school of international law" (1992) American Society of International Law Proceedings 118.

[48] See also Franck note 43 at 10-11.

[49] Hart H, The Concept of Law (1961, Clarendon Press, Oxford) 91-95.

[50] Ibid at 213.

[51] Kelsen H, Pure Theory of Law (1970, University of California Press, Berkeley) 323-324 (translated Max Knight).

[52] Hart note 49 at 228.

[53] Franck note 43; refer also Franck T, Fairness in International Law and Institutions (1995, Clarendon Press, Oxford).

> From what ultimate provision of the system do the separate rules derive their validity or binding force?[54]

Because the Security Council functions in a manner analogous to a sovereign body,[55] it is possible to apply these theories to the question of limitations on the exercise of Security Council powers. In a legal system where it can be said that the sovereign derives authority from the "will of the people",[56] as in a parliamentary democracy, the ultimate accountability of government is the removal and replacement of the law-making body by the population.

In other words, the acts of the law-making body are legitimated by the ability of the population to remove that body from its position of authority, and hence their implied consent to its actions. However, in systems where the concepts of democratic accountability and open government are unknown, simple reliance upon the "authority of the sovereign" does not legitimise all actions of the law-making body.[57]

In this context, the structure and procedures of the Security Council outlined above should be noted. The permanent members have significant power within the Security Council structure, both through the power of veto and the economic and military power which enables them to propose and ensure the carriage of resolutions. An affluent and powerful state like the United States or China is very likely to be able to pressure smaller and

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[54] Hart note 49 at 229.

[55] It has been said that "[b]y taking enforcement measures, the Security Council may create new law": Kelsen, "Procedures of coercive settlement: sanctions, peace-keeping and police" in Falk R and anor (eds), The Strategy of World Order (1966, New York World Law Fund, New York) Volume III at 488.

[56] See Crawford, "Democracy and international law" (1993) 64 British Yearbook of International Law 113, 114 where he states "[t]hat the will of the people is to be the basis of the authority of government is as good a summary as any of the basic democratic idea".

[57] It was recently suggested that there is an emerging "right to participate in government": refer discussion in Fox and anor, "Intolerant democracies" (1995) 36 Harvard International Law Journal 2, 9.

less powerful members of the Security Council. This pressure could be applied, even within the very short time-span in which many resolutions are considered, both by the prior publication of the powerful state's position in relation to particular issues,[58] and by the fact that the permanent members, in particular, maintain large and well staffed diplomatic corps at the United Nations, which could be used to transmit informal messages to the representatives of the smaller states.[59]

Thus, the Security Council raises the possibility that it can be dominated by the permanent members, who acting together, can utilise the terminology of the United Nations to legitimise actions that may in fact be abhorred by the international community.[60] Salcedo has expressed these fears as follows:

> The Security Council should not be an instrument to be manipulated by certain states who are in a position to act to protect their own interests and not those of the international community.[61]

Informal reports of the internal practices of the Security Council do nothing to remove these fears. Typical consideration of a resolution apparently involves a series of informal consultations[62] amongst the permanent five

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[58] Caron, "The legitimacy of the collective authority of the Security Council" (1993) 87 American Journal of International Law 552, 563-564.

[59] Byers, "Custom, power and the power of rules: an interdisciplinary perspective on customary international law" (1995) 17 Michigan Journal of International Law 109.

[60] Reisman stated: "The United States has a major interest in the maintenance of the United Nations as an effective and legitimate instrument of policy": Reisman, "Haiti and the validity of international action" (1995) 89 American Journal of International Law 82, 84. The United States Chief of Staff during the Gulf War, General Colin Powell, is reported to have delayed enforcement of the naval blockade until Security Council authorisation had been obtained by saying the following: "the UN ambassador is making progress getting approval for the blockade": see Schwarzkopf N, It Doesn't Take a Hero (1992, Transworld Publishers, London) 322.

[61] Dupuy R (ed), The Development of the Role of the Security Council (1993, Martinus Nijhoff Publishers, Dordrecht) 143.

[62] Bailey note 37 at 10-11; Feuerle, "Informal consultation: a mechanism in Security Council decision-making" (1985) 18 New York University Journal of International Law and Politics 267.

members, or even amongst the "permanent three" only, namely, France, the United Kingdom, and United States, prior to any formal (and hence reported) meeting.[63] It is quite possible that these informal discussions are linked to issues, such as trade or regional security, that are extraneous to the matter being considered.[64]

Thus, there is at least some evidence of the domination of the Security Council by the permanent members. This domination is significant because of the virtually insurmountable barriers to their removal from the Security Council. Article 108 provides that any amendment to the United Nations Charter requires the assent of not only two thirds of the members of the United Nations, but also the assent of each of the permanent members of the Security Council. Because there is a complete absence of any quasi-democratic power of removal of any of the "sovereign" permanent members, Security Council resolutions cannot inherit their fundamental validity from democratic principles. Instead, this discussion proposes that the validity of Security Council resolutions is tested against the recognition of the particular resolution as valid by the "subjects of the Security Council"; namely, the member states of the United Nations.

The proposition is supported by the theory proposed by Franck, who suggests that the validity of resolutions of the Security Council can be determined with reference to their "legitimacy" which is tested with reference to a number of factors such as the determinacy, coherence and transparency of a resolution.[65] If this tenet is correct, it may be argued that a limit on Security Council powers exists, beyond which its actions cease to

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[63] Advantages of informal consultations include the ability to speak freely and negotiate positions: ibid at 290.

[64] See Caron note 58 at 563; Weston, "Security Council Resolution 678 and Persian Gulf decision making: precarious legitimacy" (1991) 85 American Journal of International Law 516, 523. See also Aust, "The procedure and practice of the Security Council today" in Dupuy note 61 at 366. It is probably impossible to prevent such pressures and considerations being used to pressure voting participants, although it will be argued below that a system of representative regional voting would go some way to alleviating this problem.

[65] Franck T, Fairness in International Law and Institutions (1995, Clarendon Press, Oxford) 221.

be legitimate, and therefore cease to have any binding force in the international community. The Council, acting within its legitimate authority, would have complete freedom of action, although within the constraints of the Charter considered below and subject to the usual voting process.

The effect of Security Council actions taken in breach of the legitimate limit of its powers is complex and will be considered below.

What is the Proposed Limit of Legitimate Action?

The main defect of Franck's analysis is the lack of clearly definable criteria by which the legality and binding force of Security Council resolutions may be tested.[66] The following discussion attempts to provide some guidance in that context. One possibility is that the Charter itself contains provisions which determine the normative validity of the actions of the Security Council.

Article 25 of the Charter provides:

> The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

This provision may be interpreted in two ways. It is possible to characterise the provision as requiring members of the United Nations to carry out all decisions of the Security Council, and that act of the members is to be in accordance with the Charter. The alternative characterisation is that the provision carries with it an implication that states need not accept or carry out resolutions of the Security Council if the resolutions were not themselves undertaken in accordance with the provisions of the Charter. This second interpretation is plausible[67] and was suggested by Kelsen. He

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[66] Indeed, it could be argued that Franck unjustifiably assumes the existence of some limitation on Security Council Chapter VII powers: ibid at 220-221.

[67] Further, it is in accordance with the principles of the interpretation of treaties in international law; also refer to the 1969 Vienna Convention on the Law of Treaties Article 31(1).

characterised Article 25 as a requirement, stating that:

> [t]he Members are obliged to carry out only those decisions which the Security Council has taken in accordance with the Charter.[68]

This position is however, not supported by reference to the *travaux préparatoires*, where it can be seen that an amendment which would have required the Security Council to be bound by the Charter was defeated.[69] In any event, assuming Article 25 could be characterised as creating a positive obligation on the Security Council to act in compliance with the Charter, the identification of the actual content of the proposed limit would be no closer. The Charter itself grants the Security Council the power of definition in relation to the existence of a threat to international peace and security.[70] Thus, a requirement that the Security Council acts "in accordance with" the Charter does not assist. The recent practice of the Security Council in relation to Article 39 will be questioned below.

Article 24(2) of the Charter provides that the Security Council must "act in accordance with the Purposes and Principles of the United Nations." But one of the "Purposes" in Article 1(1) is the maintenance of international peace and security.[71] Since it is the definition of those words that is the

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[68] Kelsen H, The Law of the United Nations: a Critical Analysis of its Fundamental Problems (1950, Stevens & Sons Ltd, London) 95.

[69] [1945] UNCIO Volume XI at 114.

[70] Article 39 states that "[t]he Security Council shall determine the existence of any threat to the peace".

[71] Article 1(1) provides:

> The Purposes of the United Nations are:
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes...

It is submitted that the reference to the principles of justice and international law applies only to the "adjustment of international disputes", and not to the "taking of effective

subject of exploitation, Article 24 does not constrain the Security Council in any practical manner. Although interpretation of the specific provisions of the Charter will be necessary to find mechanisms to ensure that the Security Council does not exceed the legitimate limits of its powers, it does not assist in the search for the content of those limits. Instead, it is necessary to examine the overall structure of the United Nations and the Security Council and their role in international order.

This discussion proposes that the search for this international role should primarily focus on the constituent treaty in accordance with traditional principles of treaty interpretation. Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties provide the following:

> *General rule of interpretation*
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> (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> > (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;
> >
> > (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> (3) There shall be taken into account, together with the context:

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collective measures". The provision does not require the Security Council to act in accordance with international law when operating under Chapter VII. For alternative opinions, see Weeramantry J in his dissenting opinion in the Lockerbie (Jurisdiction) case [1992] International Court of Justice Reports 3, 65; MacDonald, "Changing relations between the International Court of Justice and the Security Council of the United Nations" (1993) 31 Canadian Yearbook of International Law 3, 25.

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 provides as follows:

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

The *traveaux préparatoires* of the United Nations Charter clearly shows that the intention was to create the Security Council as a body which would act to maintain peace and security amongst nations. President Roosevelt, in his Message to the United States Congress on 6 January 1945, spoke of the Security Council as "obliged to defend and justify itself within the framework of the general good."[72] Similarly, Senator Connally, representing the United States on Committee III at the San Francisco Conference, said in the context of the permanent members:

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[72] [1945] UNCIO Volume XI at 108.

> [that] they will discharge the duties of their office not as representatives of their own governments, not as representatives of their own ambitions or their own interests, but as representatives of the whole organisation in behalf of world peace and in behalf of world security.[73]

The intention was not to create a "world policeman"[74] with power to force compliance with international law, but rather was to create an institution with specific responsibility for the maintenance of international peace.[75] There is substantial support for the existence of an objective limitation, both amongst state practice and authoritative commentators. Thus, Franck has said that:

> The United Nations is the creature of a treaty and, as such, it exercises authority legitimately only in so far as it deploys powers which the treaty parties have assigned to it.[76]

State representatives have sought limits on Security Council autonomy. The then Australian Minister for Foreign Affairs, Gareth Evans, called for reform of the Security Council in an address to the General Assembly on 29 September 1992, in order that it be able to "both fulfil its duty and command overwhelming consensus for its decisions in the years ahead".[77]

Similarly, in the debate in the Security Council prior to the adoption of Resolution 748, several state representatives spoke of the need to consider

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[73] [1945] UNCIO Volume XI at 131.

[74] See Alston, "The Security Council and human rights" (1992) 13 Australian Yearbook of International Law 130, 174.

[75] It is only by virtue of the agreement of the member states that the Security Council exists: see the dissent of Judge Fitzmaurice in the Namibia opinion: note 39 at 293-294.

[76] Dupuy note 61 at 151; Eagleton, "The jurisdiction of the Security Council over disputes" (1946) 40 American Journal of International Law 513, 530; Caron note 58 at 561; Franck, "The 'powers of appreciation': who is the ultimate guardian of UN legality" (1992) 86 American Journal of International Law 519, 523.

[77] (1993) 14 Australian Yearbook of International Law 593.

the beliefs of the members of the General Assembly. The representative of Zimbabwe, Mr Mumbengegwi, said:

> It is therefore of crucial importance that every decision taken by the Security Council be able to withstand the careful scrutiny of the 160 Member States on whose behalf the Security Council is expected to act.[78]

These factors support the proposition that the Security Council must exercise its power in a manner that is consistent with the purposes for which it was created, namely the maintenance of international peace and security, objectively determined. By introducing objectivity, legitimacy is protected. This fundamental rule need not conflict with the principle that the interpretation of the powers of the Security Council under the Charter is prima facie a question for the Security Council itself. The Security Council can and does take into account considerations which may not be immediately apparent when making determinations under Chapter VII of the Charter. It must have flexibility in the exercise of its duties.[79]

Nevertheless, the concept of international peace and security is capable of objective definition on a case by case basis. The International Law Commission has referred to breaches of international peace and security as:

> acts seriously affecting the relations between States, involving either a breach of their sovereignty or territorial integrity or an attack on their stability, which thereby constitute an offence against international peace and security.[80]

Although it is impracticable to adopt the above as an exhaustive definition of breaches of international peace and security, because the circumstances

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[78] S/PV 3063 at 54.

[79] See Gowlland-Debbas, "Security Council enforcement actions and issues of state responsibility" (1994) 43 International and Comparative Law Quarterly 55.

[80] Report of the International Law Commission the work of its 37th session to the General Assembly 40th session (1985); GAOR, 40th session, supplement no 10, A/40/10.

of individual cases may differ widely, it serves to demonstrate one understanding of the term. Recent practice of the Security Council, considered below, demonstrates an expansive trend. The international community and the Members of the United Nations are at present grappling with the definition of "international peace and security". This difficulty in defining the limits of legitimate Security Council action does not, however, detract from the proposition that there exist some such limitations on the power of the Security Council to make Chapter VII determinations.

This article has endeavored to draw from the nature of the Security Council and the powers granted to it to show that the international community as a whole has the right to ensure that those powers are not exercised in a manner inconsistent with the mandate given to the Security Council by the member states. This fundamental rule must underlie every mandatory Chapter VII resolution of the Security Council. It was shown in Part I of the article that the greatest threat to collective security mechanisms is concentration by member states on the furtherance of national goals. By a recognition of the fundamental requirement for legitimacy, together with mechanisms by which that legitimacy can be determined, it is rendered less likely that the fate of the historical institutions discussed above will befall the Security Council.

III. CONSIDERATION OF RECENT RESOLUTIONS UNDER CHAPTER VII

Iraq/Kuwait Gulf Crisis

The Security Council acted decisively in the crisis resulting from the Iraqi invasion of Kuwait in 1990. The episode has widely been cited as an instance of effective collective response to an act of aggression, and there is no doubt that in many respects the response achieved the ultimate goals of the Charter. The eventual finding of the existence of a breach of international peace and security in Resolution 660 was itself uncontroversial and there is no issue as to its validity within the framework proposed in this article. However, the conflict raises other significant issues, including the extent to which the resolutions fulfilled the mandate of the Charter, and issues of delegation and accountability.

The Security Council functioned effectively in the days that immediately followed the invasion by Iraq. Within four days, Resolution 661 had been

passed. The resolution imposed sanctions on Iraq to enforce compliance with Resolution 660 which demanded the withdrawal of all Iraqi troops. On the other hand, Resolution 678[81] only partially fulfilled the aims of the Charter[82] even though it effectively initiated the "allied" military action against Iraq and was practically effective. Instead of initiating an international United Nations force to restore the breached independence of a member state, the resolution gave a broader authority for member states:

> [to] use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent resolutions and to restore international peace and security in the area...

It has been suggested that the reliance on the United States-led coalition to fulfil the terms of the resolution deprived the resolution of any real link with the Security Council and instead legitimised a unilateral action.[83] The fact that the absence of any United Nations commanded troops[84] necessarily involves delegation of authority to one or more member states raises questions of those states' accountability of to the Security Council. When, as was the case here, the resolution which authorised the intervention was sponsored by the power which then controlled the military action, the issue of accountability may become magnified.

In the case of the Gulf War, any accountability of the military commanders to the Security Council up to and following the commencement of military operations was haphazard at best,[85] thus raising the issue of the relationship between the Security Council and the General Assembly. This discussion proposes below the creation of a liaison committee to facilitate the interchange of information and views between the two bodies.

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[81] This resolution was passed on 29 November 1990.

[82] For a critique of this resolution, see Weston note 64.

[83] For example see Rostow, "The Gulf crisis in international and foreign relations law" (1991) 85 American Journal of International Law 506, 508.

[84] See Boutros-Ghali, "An agenda for peace" in Roberts and anor, note 2.

[85] Weston note 64 at 527.

By framing Resolution 678 in terms of "all necessary means", the Security Council demonstrated a willingness to place unlimited trust in its more powerful members. This trust may well be justified, but where the Security Council itself is largely dominated by one or more of the powerful permanent members, such trust cannot be assumed. The goals of a state and the goals of the Security Council will not normally be identical. The recognition that large and powerful states bear the brunt of maintaining international security, both within and outside the context of the Security Council does not justify the Security Council itself abrogating its duties in favour of one or more of those nations. To do so is to ignore the relationship between the Security Council and the totality of the international community.

It is possible to question the motives for the "allied" intervention in the Kuwait incident. Because the Security Council is granted such wide powers, both definitional and substantive, there has always been scope for the Security Council to act to legitimise acts of one or more of the permanent members which would otherwise be likely to bring condemnation from the international community.[86]

This is in many respects a symptom of a more fundamental flaw in the collective security system of the United Nations. Member states are extremely reluctant to undertake military obligations in the name of collective security unless there is also a corresponding benefit in terms of those states' domestic policies.[87] This is understandable, given that military enforcement actions inevitably bring with them both great economic cost and a large element of risk to the soldiers in action. States will not willingly sacrifice their youth for ideals which may be both unattainable and not in the direct interests of those states. In the words of Reisman, "National interest is still defined in largely national terms."[88]

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[86] See Reisman, "Peacemaking" (1993) Yale Journal of International Law 415, 418.

[87] See James, The United Nations and the Maintenance of International Peace and Security (1987, United Nations Institute for Training and Research, Martinus Nijhoff Publishers, Dordrecht) 219.

[88] Reisman note 86 at 419.

Iraq's invasion of Kuwait was a breach of international law and of the peace justifying intervention under Chapter VII of the United Nations Charter. It was clearly a matter for the concern of the international community. What was also clear was that the United States had significant "strategic interest"[89] in Kuwait arising from the flow of oil, both from Kuwait and the potential threat to Saudi Arabian oil exports. A senior administration official in Washington was quoted in the New York Times as saying, "Our concern is free access to oil."[90] It is not suggested that this motive was the sole basis of the United States sponsored Resolution 678. However, it evidences that there may be multiple motives for action taken in the name of the Security Council, and that the true motive need not always be stated.

Libya/United Kingdom and United States: the Lockerbie Dispute

The tragedy of the bombing destruction of Pan Am flight 103 over the Scottish town of Lockerbie has led to one of the most controversial resolutions of the Security Council in recent years, unrelated to questions of large scale military action. The Security Council response to the tragedy raises significant issues of accountability and reform. The legal issues arise from the belief of the United States and United Kingdom that the primary suspects in the bombing are two Libyan nationals, alleged to be supported by the state of Libya. The truth or falsity of these allegations remains unclear, and it is not intended to deal with this aspect of the incident.

Libya, the United Kingdom and the United States are parties to the 1971 Montreal Convention to Suppress Acts of Violence against Civil Aviation ("Montreal Convention").[91] Article 14 provides that a contracting state must take into custody any alleged offender within its territory, and notify other contracting states that it has done so. It must then elect to prosecute the offender in its own courts or comply with a request for extradition. The efficacy of these provisions in a case where the alleged offender is said to have been acting with the knowledge or support of the state exercising

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[89] Pyrich, "Recent developments" (1991) 32 Harvard International Law Journal 265, 274.

[90] New York Times 5 July 1990 at A1.

[91] The Montreal Convention applies in its terms to acts of terrorism like the bombing of Flight 103.

jurisdiction is open to question.[92] However, Libya had consistently asserted that there existed a dispute on the interpretation or application of Article 14 of the Montreal Convention, and therefore the dispute should be submitted to arbitration in the absence of agreement through negotiation.

The response of the United Kingdom and the United States was to sponsor a draft resolution before the Security Council.[93] The resolution required Libya to comply with the demands of the United Kingdom, France and the United States, and surrender the two subjects. It is most remarkable for its apparent disregard of the provisions of Article 27(3) of the United Nations Charter, which provides that in any decision under Chapter VI the parties to a dispute shall abstain from voting.

The resolution is not explicitly stated to be related to Chapter VI or Chapter VII, but it seems to be referable to Article 33 in Chapter VI which empowers the Security Council to call upon parties to a dispute to settle the dispute peacefully, or under Article 36 of Chapter VI which empowers the Security Council to recommend procedures or methods of adjustment at any stage of a dispute referred to in Article 33 or one of a like kind. In those circumstances, the United States and the United Kingdom ought not to have participated in the voting on the resolution.[94]

Libya, having declared its willingness to co-operate with the Secretary-General,[95] took its case to the International Court of Justice on 3 March 1992. The United Kingdom and the United States argued strenuously that the proceedings were invalid due to the concurrent steps being taken by the Security Council.[96]

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[92] See the submissions of the United Kingdom and the United States before the International Court of Justice in the request for provisional measures brought by Libya: CR 92/6 at 8.

[93] Security Council Resolution 731 (1992).

[94] See Graefrath, "Leave to the Court what belongs to the Court" (1993) 4 European Journal of International Law 184, 188.

[95] See Weller, "A premature end to the new world order?" (1992) 4 African Journal of International and Comparative Law 302, 315.

[96] CR 92/3 at 70-71.

Following oral argument before the Court, but prior to judgment, the Security Council met again to consider the non-compliance with Resolution 731. A draft resolution,[97] sponsored again by France, the United Kingdom and the United States, was put before the Council, which determined that the failure by Libya to comply with Article 731 was itself a threat to international peace and security and justified the imposition of sanctions under Chapter VII.

In addition to the questions of legitimacy that arose from Resolution 731, the new resolution raised great difficulties in the interpretation of the Charter and the accountability of the Security Council. These difficulties were reflected both in the debate that took place before the passage of the resolution and in the voting pattern.

Speaking immediately prior to voting on the resolution the Libyan representative on the Security Council repeated the offer to surrender the two suspects to the United Nations office in Tripoli for investigation.[98] The representative of Mauritania stated that the resolution would "condemn the Libyan people for an act responsibility for which has not yet been established".[99] The representative of Zimbabwe expressed great concern at the implications for the role of the Security Council stating that:

> As the body entrusted with the primary responsibility for the maintenance of international peace and security, the Security Council must attach due importance to international law, including international conventions.[100]

The voting pattern is revealing. The resolution was passed by ten votes, with five abstentions and no negative votes. The five representatives that

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[97] Resolution 748 (1992).

[98] S/PV 3063 at 11.

[99] S/PV 3063 at 31.

[100] S/PV 3063 at 54.

abstained included China, a permanent member.[101] As a minimum of nine votes are required under the amended Article 27(3) of the Charter, it can be seen that the resolution was barely successful. Had any two members who voted in favour of the resolution abstained from voting, the resolution would have failed.

Resolution 748 raised squarely the issue of the ability of the Security Council to determine the limits of the phrase "international peace and security". Clearly, terrorism, particularly as manifested in the latter part of this century, can constitute such a threat. That threat is increased many times over if the terrorism is state-sponsored. However, whether or not the two suspects in the Lockerbie case were justly accused and whether or not they were actually supported by the state of Libya, Libya in this instance had given clear and unequivocal assurances that it renounced terrorism[102] and had gone so far as to agree to surrender the suspects, albeit not on the terms requested by the United States and the United Kingdom.

There is a clear implication that the procedure of the Security Council was utilised by two permanent members for their own ends, driven by the perceived popular support of their own populations. In the circumstances of 31 March 1992 it is difficult to discern an objective continuing or threatened breach of international peace and security. Thus, the actions of the Security Council in relation to the Lockerbie bombing demonstrate a real risk of breach of the fundamental rule which it is suggested limits Security Council actions. This, and other issues, will be the subject of consideration by the International Court of Justice in the merits phase of the litigation brought by Libya.

Humanitarian Resolutions

Since 1991, the Security Council been more ready to pass mandatory resolutions in relation to aggression. In the case of Resolution 748 against terrorism, it has also purported to create a new role as protector of

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[101] The other abstentions came from Zimbabwe, India, Cape Verde and Morocco.

[102] Libya Press Release, 22 January 1992, in Weller note 95 at 314.

humanity.[103] With the spate of post-1991 resolutions in relation to Iraq's Kurdish population,[104] the breakdown of Yugoslavia,[105] Somalia,[106] Haiti,[107] Liberia,[108] and Rwanda,[109] the Security Council readily expanded the ambit of its jurisdiction, in some cases by apparently equating human rights violations with a threat to international, and often regional, peace and security. The Security Council appeared to be aware of the need to legitimise its actions in terms of the mandate given to it under the Charter. This was apparent from the frequent references to actual or potential refugee flows into neighboring states.[110] The prospect of large scale refugee flows was used as the link between humanitarian violations and a threat to international peace and security in the case of the Security Council's actions in relation to Haiti, Rwanda, Yugoslavia and Somalia.

(i) Haiti

In 1991, the elected Prime Minister of Haiti, Jean Bertrand Aristide was overthrown by a military revolution. Following lengthy and unsuccessful negotiations, and together with previous consideration by the Security

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[103] It has been suggested that this occurred previously in the context of the Security Council action over Southern Rhodesia: see Reisman, "Haiti and the validity of international action" (1995) 89 American Journal of International Law 82; Fenwick, "When is there a threat to the peace? – Rhodesia" (1967) 61 American Journal of International Law 753, 754.

[104] Security Council Resolution 688 (1991).

[105] Security Council Resolutions 713 (1991), 757 (1991), 770 (1992), 819 (1993), 824 (1993) and 836 (1993).

[106] Security Council Resolutions 733 (1992), 751 (1992), 794 (1992), 814 (1993) and 837 (1993).

[107] Security Council Resolutions 841 (1993) and 940 (1994).

[108] Security Council Resolutions 788 (1992) and 866 (1993).

[109] Security Council Resolutions 788 (1992) and 866 (1993).

[110] For example see Security Council Resolutions 688 (1991) and 940 (1994).

Council,[111] a draft resolution imposing sanctions and a military blockade on the island was put before the Security Council at the request of the Aristide government representative to the United Nations. The resolution,[112] adopted by fifteen votes to nil, provided for the imposition of a trade embargo and military blockade of Haiti. Following a reference to "mass displacements of population becoming or aggravating threats to international peace and security", the Security Council determined that:

> in these unique and exceptional circumstances, the continuation of this situation threatens international peace and security in the region.[113]

The representative of Venezuela, Mr Arria, set out the most persuasive justification for the resolution by referring to the possibility of "a substantial increase of hundreds of thousands of Haitians, in terrified flight to other countries", thus constituting a potential threat to regional and international security.[114] However, the words of the representative of Brazil, Mr Sandenberg, reveal a fundamental misunderstanding of Chapter VII of the Charter. He stated that:

> prior action [by the OAS] provides a framework which warrants the extraordinary consideration of the matter by the Security Council and the equally extraordinary application of measures provided for in Chapter VII of the United Nations Charter.[115]

Following the successful vote on the resolution, Dr Madelaine Albright, the then United States representative to the Security Council, made a speech which referred to human rights abuses and the right to democratic governance. But it failed to refer to anything which could objectively give

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[111] For example the statement by the Security Council on 26 February 1993, S/25344.

[112] Security Council Resolution 841 (1993).

[113] Ibid.

[114] S/PV 3238 at 11.

[115] Ibid.

rise to a threat to international peace and security,[116] namely, the legal basis for the actions of the Security Council. The issues raised by Resolution 841 were brought into even starker view by the adoption (by twelve votes to nil with two abstentions)[117] of Resolution 940. This resolution provided for a multinational force, in language reminiscent of that used in the Kuwait crisis, to use "all necessary means" to:

> facilitate the departure from Haiti of the military leadership,...the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti...

The resolution refers to:

> [the] significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal *de facto* regime of systematic violations of civil liberties, the desperate plight of Haitian refugees and the recent expulsion of the staff of the International Civilian Mission...

It went on to state that the aims of the international community were:

> the restoration of democracy in Haiti and the prompt return of the legitimately elected President, Jean-Bertrand Aristede, within the framework of the Governors Island Agreement.

The Security Council then determined that the "situation in Haiti continue[d] to constitute a threat to peace and security in the region".[118]

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[116] S/PV 3238 at 18.

[117] China and Brazil.

[118] Contrast Security Council Resolution 841 (1993) with statements made in the Security Council in 1946 during the debates on the Spanish Franco regime. Then, the majority of representatives agreed that the mere existence of a repressive regime was not sufficient to justify application of United Nations Charter Chapter VII powers. The distinction, as noted by the Australian representative, would permit Council action where the regime threatened world peace "by its actions, by its policy, both at home and abroad, in conjunction with revolutionary groups of other countries", SCOR 1st Year, 1st Ser No 2 at 195.

This resolution is linked only tenuously with the objective existence of a threat to international peace and security, presumably through the continued potential threat of mass refugee flows from Haiti.[119] The potential threat to international peace and security caused by the existing refugee flows and the potential for vastly inflated numbers of refugees created a situation in which it cannot be said that there was manifestly no threat to peace and security in the region. Thus, it is probably within the legitimate discretion of the Security Council to have made that finding in the particular context. However, many of the members of the Security Council seemed to rely more on the restoration of democracy as the basis for the intervention than on any objective threat to international peace and security.[120]

It is clearly preferable for the Security Council to state clearly and precisely the basis for its actions, in order to forestall any doubts about its actions amongst the wider international community of member states. This is particularly the case where the resolution is mandatory and refers expressly to many factors, which although possibly breaches of international legal obligations, do not obviously constitute a threat to international peace and security.[121] When member states of the United Nations are forced to imply the legitimate basis of a Security Council resolution under Chapter VII, there is potential for a loss of confidence in the Council's actions, with consequences discussed below.

(ii) Somalia

A similar situation is found in relation to the resolutions taken in response to the fighting in Somalia. Resolution 733 imposed a general "arms embargo" and referred to:

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[119] Most of which were towards the United States: see Sale v Haitian Centers Council (1993) 125 Lawyer's Edition, 2d, 128, 138-140.

[120] Glennon, "Agora: the 1994 US action in Haiti" (1995) 89 American Journal of International Law 70, 72. The concept of the restoration of democracy has been generally discussed by Schacter, "The legitimacy of pro-democratic invasion" (1984) 78 American Journal of International Law 645, 648-649.

[121] In the words of Dinstein, the threat to the peace may be "one which is imperceptible to the public eye": Dinstein Y, War, Aggression and Self-Defence (1994, Cambridge University Press, Cambridge) 283.

> [the] rapid deterioration of the situation in Somalia and the heavy loss of human life and widespread material damage resulting from the conflict in the country and aware of its consequences on the stability and peace in the region...

Thus, the resolution assumed that the fighting in Somalia did in fact have consequences for the stability and peace in the region. Then, in paragraph 5, the Security Council decided that:

> under Chapter VII of the Charter of the United Nations, all States shall, for the purposes of establishing peace and stability in Somalia immediately implement a general and complete embargo on all deliveries of weapons...

Resolution 794 authorised the United States-led force which intervened in Somalia. The Security Council found that:

> [t]he magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security.

Security Council members, in statements made before the voting, referred to the "defined and limited objective",[122] the "atypical situation there"[123] and "the international community's obligations to put an end to the human tragedy".[124]

The resolution was adopted unanimously, but once again the implication to be drawn is that the Security Council was concerned more with the loss of life than with any threat to international peace and security. In fact, the

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[122] Mr Ayala Lasso (Ecuador): S/PV 3145 at 13.

[123] Mr Noterdaeme (Belgium): ibid.

[124] Mr Vorontsov (Russian Federation): ibid at 27.

Secretary-General went so far as to say that the intervention was "for strictly humanitarian purposes".[125]

(iii) Yugoslavia

The breakdown of society in the former Yugoslavia was the subject of a number of resolutions by the Security Council. The resolutions raised many of the issues dealt with by this article.

Resolution 713,[126] which imposed an arms embargo on the former Yugoslavia, is relatively easy to reconcile with the fundamental principle proposed in this article. In that case, the Security Council described the heavy fighting in Yugoslavia, and "the consequences for the countries of the region, in particular in the border areas of neighboring countries". The resolution went on to find that the "continuation of this situation constitutes a threat to international peace and security" and then imposed the arms embargo, "under Chapter VII of the Charter." Clearly, it was within the Security Council's legitimate power to make that finding in the light of the fighting in the former Yugoslavia.[127] One possible criticism is that the imposition of the arms embargo did not refer to any specific Article of the Charter, instead being referable to Chapter VII generally. This is a practice that is common to most of the recent resolutions considered above.

The Yugoslavian problem was considered again by the Security Council another resolution[128] which imposed economic and cultural sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro). This resolution reaffirmed previous resolutions, including Resolution 713. It went on to determine that:

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[125] 1994 Report of the Secretary-General to the General Assembly, GAOR, A/48/1, (1994) at 52.

[126] This resolution was passed in 1991.

[127] The resolution does not set out the grounds upon which the threat to peace was based: see Weller, "The international response to the dissolution of the Socialist Federal Republic of Yugoslavia" (1992) 86 American Journal of International Law 569, 179.

[128] Security Council Resolution 757 (1992).

> the situation in Bosnia and Herzegovina and in other parts of the former Socialist Federal Republic of Yugoslavia constitutes a threat to international peace and security...

The resolution also provided the basis for a "security zone" surrounding Sarajevo airport, in a manner reminiscent of the safe havens established in Northern Iraq during the Kurdish crisis. Once again, the resolution lacks any specific detail as to the matters which constitute the threat to international peace and security. Although it may be that the fighting constituted a threat to international peace and security, it is also arguable that the fighting was contained within the borders of the former Yugoslavia[129] and, as such, there was there was no such threat. In the latter case, the matter was not one which should properly have come under the terminology of Chapter VII of the Charter, notwithstanding the injuries to the civilian population.

Similar issues are raised by later resolutions on various aspects of the Yugoslavian crisis.[130] The conflict between the power of the Security Council and the right, enshrined in the Charter, to territorial integrity,[131] is recognised by the Security Council in these resolutions.[132] The unsuccessful efforts to restrain fighting in the former Yugoslavia highlights the true limits of the Security Council's powers. Where there is no objective threat to international peace and security, the basis for action and the aims of any intervention are easily blurred.[133] By failing to distinguish between the

[129] For a general description of the events, see Kresock, "'Ethnic cleansing' in the Balkans: the legal foundation of foreign intervention" (1994) 27 Cornell International Law Journal Law Journal 203, 225-232.

[130] Thus, Security Council Resolution 836 (1993), creating "safe areas" in Bosnia and Herzegovina, merely seems to pay lip-service to the need to find a threat to international peace and security, and again describes the Security Council as "Acting under Chapter VII of the Charter".

[131] Article 2(7), which does not apply only where the Security Council is taking action under Chapter VII.

[132] For example Security Council Resolution 970 (1995) para 2.

[133] It has been suggested that lack of specificity in the enabling resolutions significantly hampers the peacekeeping mission; see Goebel, "Use of force in UN peace-making" (1993) 25 New York University Journal of International Law and Politics 627, 676.

concepts of peace-making and peace-keeping,[134] that body may have damaged its long-term effectiveness.

(iv) Rwanda

The Security Council's response to the civil war in Rwanda has also been the subject of criticism. The Security Council reacted to the clear evidence of civilian slaughter with a hesitant series of resolutions providing for limited intervention. Resolution 812 (1993) reflected its grave concern caused by "the fighting in Rwanda and its consequences regarding international peace and security." Notwithstanding the reference to international peace and security, the resolution did not purport to apply Chapter VII of the Charter.

However, in Resolution 918 (1994), the Security Council determined that the "situation in Rwanda constitutes a threat to peace and security in the region". The only factual matters set out in the resolution relate to the "massive exodus of refugees to neighboring countries", "flagrant violations of international humanitarian law...as well as other violations of the rights to life and property". The resolution states "that the killing of members of an ethnic group with the intention of destroying such a group, in whole or in part, constitutes a crime under international law". The massive flow of refugees that took place was a threat to the region's stability, and therefore the Security Council's resolutions were objectively valid. However, the Security Council purported to relate its actions not only to the possible threat to international peace and security, but also to the large scale humanitarian abuses, and thus appeared to believe itself empowered to act to enforce international law generally.

(v) The Kurdish crisis

Resolution 688 (1991) was concerned with the repression by Iraq of its Kurdish population, which was resulting in substantial suffering and large movements of refugees. The resolution was not specifically referable to Chapter VII of the Charter. However, it noted that the refugee flows "threaten international peace and security in the region." The resolution went on to require Iraq to end the repression of the Iraqi civilian population

[134] Reisman note 86 at 419.

and allow access by humanitarian organisations. Thus, it would appear to be a resolution taken under Article 39 of Chapter VII, in that it involved a determination that there existed a threatened breach of international peace and security, and then went on to require certain action to be taken. Once again, the existence of flows of refugees constituted the trigger for the Security Council action.

The resolution was initially used as the basis for creating the so-called "safe havens"[135] from which Iraqi forces were excluded. Subsequently, it was relied upon by the United States to justify the bombing of Iraq in 1995 in response to the movement by Iraq of troops into Northern Iraq. This demonstrates the legitimating effect that Security Council resolutions may have on actions which would otherwise be highly questionable.

The Expansive Trend

Under the normative rule proposed by this article, the Security Council may only take action under Chapter VII of the Charter where there is an objective threat to international peace and security. The resolutions considered above show that the Security Council is aware of the need to link its Chapter VII resolutions to a threat to or breach of international peace and security.[136] However, they also show that there is an increasing tendency towards adopting an expanded and undefined interpretation of the phrase "threat to international peace and security".

Further, the passage of Resolution 748 in the absence of objective links to international peace and security is of great concern, and demonstrates the potential for abuse of the authority of the Security Council. Collectively, the resolutions considered above demonstrate that the Security Council was more than ever prepared to take advantage of the latitude granted by the words of the Charter to pass resolutions which may not have as their objective purpose the maintenance of international peace and security.

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[135] Greenwood, "Is there a right of humanitarian intervention?" The World Today, February 1993 at 35.

[136] Especially the threat of large scale refugee flows; see Alston note 74 at 133.

It may be that there is a developing rule of customary international law permitting intervention in cases of gross humanitarian abuses.[137] It may also be that the practice of the member states of the Security Council is relevant to the development of such a rule.[138] However, even if such a right of intervention exists, the Security Council may not under the present Charter act to police human rights abuses by the mere expedient of labeling them a threat to international peace and security.[139] Such a fundamental extension of the Charter cannot be justified merely by interpreting the existing text in light of subsequent practice.[140]

Clearly the international community cannot stand by when gross violations of fundamental human rights take place. As the German Foreign Minister stated in 1991:

> When human rights are trampled underfoot, the family of nations is not confined to the role of spectator. It can - it must - intervene.[141]

Therefore, the Security Council is the organ best suited to authorise and co-ordinate intervention to prevent such abuses. However, it may not do so under the present Charter in the absence of objective cross border effects. The Security Council is neither a world government nor policeman.[142]

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[137] There is clearly support for this position; for example see Mr Henry Kissinger who stated that "[h]uman and civil rights are widely abused and have now become an accepted concern of the world community", Address on "Toward a new understanding of community" quoted in Lane, "Demanding human rights" (1978) 6 Hofstra Law Review 269, 284.

[138] See generally Sloan, "General Assembly resolutions revisited (forty years later)" (1987) 58 British Yearbook of International Law 39.

[139] For an opposing, and it is submitted incorrect, view, see Kresock note 129 at 215.

[140] See Gowlland-Debbas, "The International Court and the Security Council" (1994) 88 American Journal of International Law 643 at 667.

[141] UN Doc A/46/PV 8 at 29.

[142] See the dissenting opinion of Gros J in the Namibia opinion: "To assert that a matter may have a distant repercussion on the maintenance of peace is not enough to turn the Security Council into a world government": note 39 at 340.

Notwithstanding the existing limitations, in view of the legitimate concern among states over human rights abuses, a proposal to amend the Charter to formally permit the Security Council to pass mandatory resolutions in relation to human rights in certain defined circumstances should be put forward at the General Assembly.[143] The principle of territorial sovereignty is of such fundamental importance to the current statist system of international law that it cannot and should not be ignored. Any extension to the limited circumstances in which interventions are to be permitted should be the subject of the most careful scrutiny.

IV. MECHANISMS CONTROLLING THE SECURITY COUNCIL IN THE EXERCISE OF ITS POWERS

Existing Mechanisms

If there is a threat that the Security Council could act in a manner which exceeds the scope of the authority delegated to it by the international community under the Charter, the present controls on Security Council actions must be considered to determine their suitability for the task of ensuring the accountability of the Security Council to the United Nations.

(i) The United Nations Charter

The Charter contains several provisions which together go some way towards a definition of the proper role and accountability of the Council. One provision is Article 12(2), which provides that the Secretary-General is, with the consent of the Security Council, to keep the General Assembly informed of all matters that are:

> relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the

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[143] There is also scope for a greater role for Convention based measures: see Cossman, "Reform, revolution or retrenchment – international human rights in the post-Cold War era" (1991) 32 Harvard International Law Journal 339, 341. Further, it is likely that any future International Criminal Court would be greatly assisted by such an expanded role for the Security Council.

> General Assembly is not in session, immediately the Security Council ceases to deal with such matters.[144]

Article 24(3) provides for annual and "when necessary, special" reports from the Security Council to the General Assembly. Articles 12(2) and 24(3) ensure that the General Assembly is kept informed of the work of the Security Council and is aware of matters in which the Security Council may exercise its wide powers. Without this precaution, it would be possible for the Security Council to take action without the full awareness of the international community. However, the practical effect of the provisions is questionable. The only formal communication between the two organs is the Security Council report that is presented to the General Assembly annually.[145] Clearly, better communication is required between the Security Council and the wider international community. However, communication alone will not ensure the accountability of the Security Council.

Article 31 provides for Member states which are not members of the Security Council to participate without vote in questions which the Security Council considers specially affect the interests of that state. However, the operation of Article 31[146] is contingent upon the Security Council itself determining that the interests of the non-member State are affected, and the role of the affected state does not include participation in any vote. The Charter also contains what would appear at first sight to be a vital and explicit restraint on the power of the Security Council in Article 2(7) which preserves the domestic jurisdiction of states. However, that body is granted the power to override this exclusion in instances of Chapter VII activity. Given the Security Council's broad and expansive interpretations of its own powers, this reservation is merely illusory in the context of mandatory resolutions under Chapter VII.

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[144] United Nations Charter Article 12(2).

[145] See for example the calls for greater coordination by Boutros-Ghali in "An agenda for peace" in Roberts and anor, note 2 at 497.

[146] Article 31 provides that "Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected."

Another possible mechanism of restraint is found in Article 24, which was discussed above. That Article confers upon the Security Council the primary responsibility for the maintenance of international peace and security and provides the following in paragraph (2):

> In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.

However, since one of the Purposes of the United Nations is to maintain international peace and security, Article 24 places no substantive limits upon the Security Council.

Perhaps the greatest practical restraint upon the exercise of power by the Security Council arises from the wording of Article 25 which states:

> The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

It was argued above that Article 25 should be interpreted to refer to the duty of Members to carry out only those resolutions of the Security Council which were taken "in accordance with the present Charter". In view of the normative rule proposed in this article, the question of whether an act is in accordance with the present Charter should be determined objectively. If this interpretation is correct, states may be legally entitled to disregard Chapter VII resolutions of the Security Council which are manifestly unrelated to international peace and security.[147] This proposition would form a major practical restraint upon the power of the Security Council to pass expansive resolutions. However, it also asks whether it is for member states to determine if an act of the Security Council is "in accordance with the present Charter", or if such a determination should be left to another body like the General Assembly or the International Court of Justice.

An associated issue is whether the international community could prevent one or more of the powerful members of the Security Council from

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[147] But according to Simma, this interpretation has a weakening effect on the obligations of member states: Simma B (ed), The Charter of the United Nations: a Commentary (1994, Oxford University Press, Oxford) 414.

themselves carrying out a resolution considered to be in excess of the legitimate powers of the Security Council. Without the support of the majority of affluent nations, military actions of any substance would be extremely difficult. The use of armed force in the modern context is extremely expensive.[148] The logistical difficulties of transporting soldiers and machines across the globe may act as a deterrent to over-frequent use of military force under Chapter VII. The cost of an actual war is such that only the most pressing crises will be solved through its use.

However, the application of economic sanctions and other boycotts by one or more of the permanent members could have a substantial impact, even if support from other member states was absent. The question of control of Security Council actions cannot be solved entirely through reliance on the support or lack of support of member nations. That influence is at most a further impediment to unlimited power.

(ii) The Veto

The main present limitation comes from the veto power of the permanent members. The veto was intended to ensure that a single permanent member could not manipulate the Security Council for its own ends. However, the veto is swiftly losing its effectiveness. The recent practice of China in abstaining from decisions in which it feels strongly that the resolution is invalid,[149] rather than exercising its veto, is worrying in this context.
This article proposes below a number of possible alterations to the voting procedure of the Security Council that may help to assist the internal accountability of the Council. However, in the absence of such reform, it is questionable whether the practice of abstaining in the face of reservations as to propriety should be sanctioned. As the economic power of the permanent members grows more uneven, external political considerations may play a greater role in the thinking of those permanent members, rendering it less likely that the veto will be exercised.

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[148] In the context of the Gulf War, see Schwarzkopf note 60 at 364-365.

[149] In the debate over Security Council Resolution 940 (1994) regarding Haiti, the representative of China to the Security Council said, prior to abstaining from the vote: "The Chinese delegation is of the view that resolving problems such as that of Haiti through military means does not conform with the principles enshrined in the United Nations Charter and lacks sufficient and convincing grounds": S/PV 3413 at 10.

Reform of the Security Council

It has been argued that there is a need for the Security Council to conduct itself in accordance with an objective standard. It has also been shown that existing controls are largely incapable of ensuring that conduct. The following section will now discuss a number of possible reforms to the Security Council, including the prospect of some form of judicial review of its actions.

(i) Judicial Review

The concept of judicial review of the actions of the Security Council (and other UN organs) was considered by the drafters of the Charter following a proposed amendment by Belgium.[150] It was decided at that time to avoid defining the International Court of Justice as a constitutional court, whilst leaving open the potential for the Court to itself define its role.[151] The interim judgments of the International Court of Justice following the request for provisional measures by Libya, and the objections to admissibility raised by the Respondents in relation to the dispute arising from the Lockerbie incident,[152] have raised the prospect of review by the Court of the actions of the Security Council. In the judgment on provisional measures, the majority of the Court considered that the adoption by the Security Council of Resolution 748 clearly took precedence over any obligations or rights which Libya may have had under the Montreal Convention. As a result, the Court refused the application for provisional measures. There can be little controversy regarding this conclusion.

However, various members of the Court foreshadowed the possibility of the Court dealing with the validity of Resolution 748 at the future hearing of the merits of the dispute. The Court had previously indicated its willingness to

[150] For example see [1945] UNCIO Volume XII at 65-66.

[151] See Graefrath note 43 at 203; and Certain Expenses case, note 33 at 168.

[152] Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America), Provisional Measures, Order of 14 April 1992 [1992] International Court of Justice Reports 3.

consider the legal aspects of disputes notwithstanding simultaneous political consideration by the Security Council.[153]

In a separate opinion in the *Lockerbie (Interim Measures)* decision, Acting President Oda implied his willingness to consider the substantive validity of Security Council resolutions and stated:

> The Security Council appears, in fact, to have been acting within its competence when it discerned a threat against international peace and security in Libya's refusal to deliver up the two Libyan accused.[154]

Judge Lachs referred to the International Court of Justice as being "the guardian of legality for the international community as a whole, both within and without the United Nations"[155] and Judge Shahabuddeen framed the issues neatly in the following terms:

> In the equilibrium of forces under-pinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such over-riding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?[156]

Earlier support for the proposition that the International Court of Justice may have a limited role of review over Security Council actions is found in the dissenting opinion of Sir Gerald Fitzmaurice in the *Namibia opinion* of the Court. In that case, Sir Gerald was concerned with the possibility of the

[153] See United States Diplomatic and Consular Staff in Tehran [1980] International Court of Justice Reports 3, 21-22; Military and Paramilitary Activities in and against Nicaragua [1984] International Court of Justice Reports 392, 433-434. The distinction between "legal" and "political" has been questioned: see Gowland-Debbas note 140 at 648-653.

[154] [1992] International Court of Justice Reports 114, 129.

[155] Ibid at 138.

[156] Ibid at 142.

Security Council acting under Chapter VII in situations where the threat to international peace and security was a "mere figment or pretext".[157] In using those words, Sir Gerald merely expressed a general concern over the possibility of the Security Council acting *ultra vires*, rather than necessarily advocating the use of the Court itself as a control mechanism. His recognition of the issue was perceptive in an era of stifled Council powers. However, he did not advance any specific justification for the choice of the International Court of Justice as the method of ensuring the normative validity of resolutions.

Nevertheless, there is considerable support for the International Court of Justice to undertake such a supervisory role and commentators say that a review would enhance the effectiveness and credibility of the United Nations organisation as a whole. For example, Franck has said that "[i]n extreme cases, the Court may have to be the last-resort defender of the system's legitimacy".[158] The growing call for judicial review seems focused on the basis of the maintenance of the legitimacy of the Security Council as an organ to maintain peace. Although the ultimate limitation of Security Council powers is a legitimate concern of the international community, the calls for formal judicial review in a substantive sense by the International Court of Justice are misplaced.

The above has shown that although there is great support for the principle that the Security Council is bound by the Charter in the exercise of its responsibilities, the Charter does not contain any express provisions that determine the normative validity of resolutions. Therefore, the specific criteria for any review remain unclear.[159] However, there are significant obstacles preventing the Court from acting as a traditional "court of appeal" from Security Council decisions. Security Council resolutions necessarily and beneficially involve political judgments. Further, judicial proceedings, particularly those involving international law, are extremely time consuming and unresponsive. Matters before the Security Council frequently, although not always, develop quickly, requiring an immediate response.

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[157] [1971] International Court of Justice Reports 16, 293.

[158] In Dupuy (ed) note 61 at 110.

[159] See Reisman note 86 at 414.

There is much truth in the argument of the United States' Department of State in the context of the Nicaragua dispute. It stated that "[t]he International Court of Justice was never intended to resolve issues of collective security and self defence and is patently unsuited for such a role".[160] However, it would be possible for the Court to hold that the Security Council manifestly acted *ultra vires* or for an improper purpose. The effect of such a finding would vary according to the manner by which the issue came before the Court. If, as will be the case if Libya continues its action, the "target" state is a direct party to the court proceedings, it may be that a finding of illegality would be injunctive in effect such that the resolution would no longer operate.

The insurmountable difficulty with this view is that resolutions of the Security Council may have their primary effect on one state, but bind all member states under Article 25. Since decisions of the International Court of Justice are binding only as between the parties to the case under Article 59 of the Court's statute, a finding in a contentious case could have no formal legal effect upon the states actually implementing the resolution.[161] It would however have an effect on the perception of the Security Council by the international community.

Franck has defined legitimacy as:

> a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.[162]

This perception of legitimacy underlies the basic authority of the Security Council. Resolutions that were found by the International Court of Justice to be invalid would lose much of their legitimacy in the eyes of the international community, and raise the prospect that states would be entitled

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[160] 24 International Legal Materials 246.

[161] But it has been argued that such a finding could render a resolution "voidable": Gowlland-Debbas note 140 at 664.

[162] Franck note 43 at 24.

to ignore the purported resolution because it was not taken "in accordance with the Charter", as required by the provisions of Article 25.

One other possibility is a finding that a particular resolution is *ultra vires* in the context of an advisory opinion of the International Court of Justice under Article 96 of the Charter. The General Assembly[163] could call for an advisory opinion on the validity of the actions of the Security Council, to the extent that legal issues were involved.[164] A finding of illegality would have a great effect upon both the likelihood of implementation of the particular resolution and on the future conduct of the Security Council.[165]

Kelsen was correct when he stated that "the Security Council is not bound strictly to comply with existing law."[166] However, if it persistently authorises actions which are regarded by the international community and judicial bodies as being manifestly in excess of its authority, it will lose its pre-eminent authority amongst the community of nations.[167]

(ii) Representation

One frequently suggested reform to the structure of the Security Council is the possibility of increasing its membership, both of permanent members and

[163] Or alternatively the liaison committee proposed below should be authorised by the General Assembly to request such opinions under Article 96(2).

[164] The Charter does not seem to limit the power of the International Court of Justice to pass advisory opinions at the request of the General Assembly or the Security Council notwithstanding that the requesting organ is not itself the subject of the opinion. But see Schachter who states that "the International Court has not been given review or appellate power to pass on decisions of the political organs unless it is asked for an advisory opinion by the organ": see Schachter O and anor (eds), United Nations Legal Order (1995, Cambridge University Press, Cambridge) Volume 1 at 13.

[165] Gowlland-Debbas suggest a finding of illegality may cause the Security Council itself to reconsider its decision: see note 140 at 673.

[166] Kelsen note 68 at 275.

[167] See Caron note 58 at 557. Hart has stated that "rules could not exist or function in the relations between states unless a preponderant majority accepted the rules and voluntarily co-operated in maintaining them": note 49 at 226.

non-permanent members. There appears to be increasing support for the addition of Japan and the united Germany as permanent members of the Council,[168] although the issue of whether to permit them the power of veto is unresolved. The addition of Japan and Germany as permanent members is justified on the basis of their potential to contribute to the maintenance of international peace and security.[169] As well as the loss of effectiveness caused by increasing size, this proposal raises a wider question of whether the Security Council is or should be representative of the wider international community of states.

As has been discussed above, the non-permanent members, elected on a rotating basis, are chosen in such a way as to coarsely represent the geographical distribution of nations.[170] However, there is at present in the practice of the Security Council no actual representation of these regional groups through the medium of "their" member.[171] The simplest and most efficient method of ensuring that the Security Council does not lose its legitimacy with the wider international community is to permit that international community to become involved in the decision making process through a process of "elective" representation.

That some delegation of decision making power is required is clear. Thus, Caron states that "[t]o be effective, international governance must be concentrated in some body other than the whole."[172] By linking the actions of members of the Security Council to their wider regional community of nations, it becomes less likely that members, particularly smaller members, will permit gross abuses of the trust placed in them by the community.

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[168] Other potential candidates are India, Brazil and Nigeria.

[169] Refer statement by the representative of France: GA/8753 at 7.

[170] They are Africa, Asia, Latin America, Caribbean, East Europe, and West Europe and Others; Neuhaus, "The United Nations' evolving security role – the need for realism" (unpublished paper).

[171] Ibid.

[172] Caron note 58 at 588.

The issue of the Security Council's structural reform has recently been given prominent consideration by the General Assembly, although it now looks increasingly less likely that such reform will occur in the short term. The then Secretary-General referred in 1994 to the issue as being one of "crucial importance".[173] As could be expected, many different views were expressed, although one recurring theme from non-permanent members was the call to remove the veto power of the five permanent members. As it is inconceivable within the present political and economic framework that the veto will be relinquished, that prospect will not be considered by this article.

The other recurring theme was that the Security Council should become more representative. The means by which this was to be accomplished varied widely. Thus, the representative from Colombia called for more non-permanent members in the Security Council and for the Security Council to conduct its work in open session.[174] Several countries advocated a more "democratic" Security Council, while others required greater representation of some regions[175] and increased equitable geographical representation. The representative from Australia proposed two alternatives, one of which involved creating "eight quasi-permanent members, allocated amongst regional groups".[176] This suggests significant support for the reform proposed in this article.

Any new seats should be created in such as way as to give an equitable distribution based not only on geographical considerations but also on population distribution. In order to ensure the accountability of the non-permanent members to their regional group, they should be nominated for election by the General Assembly to the Security Council by the regional group. If the regional group failed to agree on a nominee, the General Assembly, or perhaps the Secretary-General, could be empowered to nominate a representative from that group, which would then be elected or rejected by the General Assembly itself.

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[173] 1994 Report of the Secretary-General on the Work of the Organisation: A/48/1.

[174] United Nations Press Release, GA/8753 at 2.

[175] For example Ukraine, China, Spain and Cyprus: GA/8755.

[176] GA/8757 at 1a.

Although time-consuming, such a procedure would greatly increase the links between the Security Council and the states on whose behalf it acts. It would also have the effect of decreasing the likelihood of non-permanent members being affected by pressures applied by other Security Council members.

(iii) Further Links between the General Assembly and Security Council

One further possibility which has been suggested by various commentators is for an increased role to be played by the General Assembly.[177] The greatest difficulty with any such proposal is the fact that the requirement for swift and effective decision-taking outweighs the principles of participation. The General Assembly is too unwieldy and cumbersome to have any real participatory role in the day to day activities of the Council.

However, it has been shown that there is a need for the legitimacy of the Security Council to be considered tested by the wider international community. Its supervisory role fundamentally lies with the members of the United Nations themselves. In order to facilitate this role, some formal communication between the Security Council and the General Assembly under the authority of Article 24(3) of the United Nations Charter and beyond the currently existing practice of annual reports, is required. This would be facilitated by the creation of a liaison committee consisting of members of the General Assembly elected by that body.[178]

The role of the committee would not be of intervention, but of communication. The committee would have no formal authority and would merely act as a channel of communication between the two principal political organs of the United Nations.[179] Thus, it would be entitled to attend formal meetings of the Council, and make known the views of the General

[177] For example see Caron note 58 at 575.

[178] Other suggestions include a greater role for the Secretary-General as intermediary: refer Urquhart B and anor, Towards a More Effective United Nations (1992, Uppsala, Dag Hammarskjold Foundation) 23.

[179] See also the proposal for a "shadow council": Archbagi, "The Reform of the UN and cosmopolitan democracy: a critical review" (1993) 30 Journal of Peace Research 301, 313.

Assembly, much as non-member states interested in a particular dispute are invited to participate today.

The committee would primarily report in a formal manner on the work of the Security Council to the General Assembly, such that the decisions of the Security Council would be under constant scrutiny by the international community. It could also be authorised by the General Assembly to call for advisory opinions from the International Court of Justice on the legality of particular resolutions.

(iv) Voting Procedure

As described above, under the present arrangements, a permanent member may either vote against a resolution (veto), abstain, or vote in favour. A non-permanent member may vote in favour, abstain or vote against a resolution. However, for a non-permanent member, the effect of casting a negative vote is the same as abstaining from a vote, since in both cases the member will not have contributed towards the required nine positive votes. In practice, non-permanent members often abstain from voting after recording their strong disagreement with the draft resolution.[180]

As the final step in increasing the accountability of the Security Council, this article proposes a modification to the voting procedure that exists today. Simply put, the proposal is to give meaning to a negative vote. If a certain number of members (who will now be representative in a formal sense of their regional community) cast negative votes in relation to a draft resolution, that resolution will not be carried, even if it has otherwise obtained the requisite number of positive votes. The number of negative votes to constitute this 'group-veto' would have to be determined such that no single aligned group of states could utilise it to block a resolution, properly conceived, that impinges upon their interests. However, it would have the effect of greatly increasing the strictures upon the Security Council such that it becomes more likely that determinations of threats to international peace and security would be objectively considered, and consequently it is rendered less likely that the Council's legitimacy in the international community be threatened.

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[180] For example see the position adopted by Brazil in Security Council Resolution 40; see S/PV 3413; compare Bailey on the existence of the "hidden veto": see note 37 at 224.

This modification will necessarily involve an amendment to the Charter itself, and therefore the consent of each of the permanent members. It is possible that this consent could be obtained. The recent debates in the General Assembly show that there is great opposition to the continued existence of the veto. In the light of this hostility, it is not inconceivable that the permanent members may be pressured into accepting an additional "group-veto" as proposed, rather than continued attacks upon the existing veto and consequent loss of acceptance by the international community of the Security Council as a legitimate means of maintaining peace and security.

V. CONCLUSION

This article has shown that the Security Council developed from a heritage of collective security systems which only partially succeeded. The failure of those systems may be seen as resulting from the basic unwillingness of state participants to place full trust in them. This had the effect of rendering each system unworkable in cases of extreme stress.

The nature of the Security Council and its relationship with the wider international community demand that the Security Council act within certain limits. These limits on Security Council action are largely not definable, but nevertheless tangible. Thus, it is proposed that there is a basic normative principle underlying all legitimate Security Council actions. The Security Council may not exercise its powers under Chapter VII in ways manifestly in excess of the mandate granted to it.

The recent practice of the Security Council has demonstrated both that the Security Council is currently engaged in an exploration of the limits of its powers and the methods of execution of its responsibilities. There exists a real risk of the Security Council acting in excess of its mandate. It is not suggested that it is likely that it would become usual for the Security Council to act in an improper manner. However, given the wide and mandatory nature of the powers granted to the institution, any improper actions in breach of the fundamental principle must be avoided.

Breach of the normative rule itself, through the Security Council acting outside the objective limits of its powers, could have a number of consequences, ranging from possible judicial review and nullity of

resolutions, to a longer term effect upon the legitimacy of future resolutions of that body.

This discussion has suggested possible reforms which could reduce the likelihood of the Security Council acting for improper purposes. The reforms suggested operate on two levels. In the first instance, the alterations proposed to the membership structure and the voting procedure of the Security Council would render it less likely that resolutions would be taken in disregard of the basic principle. A Security Council member which is formally accountable, even after a resolution has been taken, to the states which ensured its election to the Security Council is less likely to be swayed easily by the rhetoric and pressure of other Security Council members. By altering the voting structure of the Security Council to permit non-permanent members a simpler and more powerful method of preventing the passage of resolutions, the unbridled power of the permanent members, largely anachronistic in the modern world, is reduced.

Secondly, the reforms operate to increase the long term efficacy of the Security Council. Limited judicial review of the resolutions of the Security Council is suggested, not for the purpose of deciding political questions between disputants, but rather to act as a deterrent to the Security Council. It is difficult to conceive of a Security Council which would continue to be able to pass effective resolutions in the face of constant advisory opinions to the effect that they were illegal in international law. At the very least, the international community of states, which together with the permanent members implement any resolutions, would be less likely to accept their binding force under the United Nations Charter. It may be that Article 25 would operate to relieve them of that duty.

This article has touched on a limited number of the issues currently unresolved in relation to the Security Council's powers and function. The Security Council, used in the manner intended by the drafters of the Charter, is a method for increasing the likelihood of international peace; at least where the dispute is not one involving a permanent member. It is hoped that this article will stimulate discussion of the boundaries of proper action of the Security Council, so that the traps that befell previous collective security systems may be avoided, and so that its role and usefulness may be preserved in the future.