

INTERNATIONAL LAW, LEGITIMACY AND THE UN SECURITY COUNCIL

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Summary

The salient issues concerning the powers of the United Nations Security Council culminate in questions of legitimacy. In terms of the United Nations Charter, the Council has a wide margin of discretion, and while its powers of appreciation are generally accepted as non-justiciable, its members are not independent. The Council has often been criticised for its selective performance, its composition and privileges of tenure, and the lack of transparency in its procedures. The objective of this study is to establish an analytical framework of legitimacy for the Council. As a point of departure, the study examines the limitations to the powers of the Council under the auspices of international law. These are expressed in two categories: the UN Charter, and *jus cogens*. Thereafter, the study develops a model of the content of legitimacy for the Council, based on a notion of legitimacy which encompasses legal, moral and sociological aspects. Three traditions are at the heart of this model. These are the instrumentalist, procedural and constitutional traditions respectively. The established framework proposes a minimal threshold for the Council to legitimately exercise its discretion, as an extension of the Charter based legal threshold, from which the Council derives its authority. The study is inspired by efforts in literature, to develop the new value-based approach to international law, whilst maintaining the coherence of the international legal order. The established framework provides a feasible means to assess the legitimacy of the Security Council, and in tandem provides space for further research.

Chapter 1

Introduction

1.1 Background

In recent years, questions of legitimacy within the context of international governance have not only gained prominence, but have become a central area of concern.¹ The legitimacy of the United Nations Security Council is pertinent, not only because its mandate is critical to the enforcement of international law, but also because in carrying out its responsibilities, the Council acts on behalf of UN member states. In this sense, its decisions reflect the *de facto* stance of the international community, and in tandem shape the evolution of international law.

In terms of Chapter VII of the United Nations Charter,² the Council has a broad margin of discretion: To determine the existence of a threat to international peace and security (Article 39) and to decide what measures are necessary to maintain or restore international peace and security once such a determination is made (Articles 40, 41 and 42).³ The Council holds peculiar status as derivative of international law, custodian of international law, and arguably author and interpreter of international law,⁴ while alternating on a case-by-case basis, whether to adhere to or derogate from international law *sensu strictu*.⁵ Suffice to say, the Council has been afforded “unique legitimacy” within the ambit of international peace and security.

¹ See, e.g. UN Doc. A/59/565 (2004) Report of the High-Level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*. Available from: <http://www.unrol.org> [Accessed: 14th December 2014].

² United Nations (1945) *Charter of the United Nations* [hereinafter Charter] Available from: <http://www.un.org/en/documents/charter>.

³ Art 39 of the Charter also provides that the Council shall determine the existence of any “breach of the peace” or “act of aggression”. However, the Council’s discretion to determine a “threat to the peace” is particularly relevant because it is the most abstract of the three terms, and evidences the depth of the Council’s powers of appreciation under Chapter VII.

⁴ See, e.g. Art 24 & Arts 39 to 42 of the Charter, which endow the Council with its mandate and emphasise its extensive powers and wide margin of discretion.

⁵ See, e.g. Art 2(7) of the Charter, which notes that the principle of non-intervention (which is a general principal of international law) shall not prejudice the application of enforcement measures under Chapter VII of the Charter.

The Security Council provides an adequate platform to observe the operation of legitimacy within the context of international governance, because its stability is dependent to some extent, on perceptions of its legitimacy.

For purposes of this study, “legitimacy” is understood as a multifaceted concept which encompasses legal, moral and sociological aspects. As such, legitimacy for the Council extends beyond a textual or legalistic interpretation of the Charter, but incorporates teleological factors which morally justify the Council’s authority. Underlying the Council’s claim to legitimacy, is the assumption that its permanent members will not advertently act in their own interest, but for the common good. Moreover, the Council’s legitimacy is founded on the assumption that its behaviour will reflect the ethos of the United Nations, as expressed in the Charter regime.

1.2 Conceptualisation of the issues

It should be noted from the outset, that the Council’s authority to act in terms of Chapter VII is subject to legal limitations. The pertinent questions that follow include where these limitations lie, and how they affect the operations of the Council. Notwithstanding, the Council’s discretion to determine the existence of a threat to peace, breach of peace or act of aggression in terms of Article 39 of the Charter, does not depend on existing international law or precedent, but on political considerations which follow the abstract interests of the Council’s five permanent members.

Curiously, the Council’s powers of appreciation under Chapter VII of the Charter are *de facto* non-justiciable, yet an oft-raised issue is that its members are not independent. Hence, it is not difficult to envisage a situation where the Council fails to be seized of a matter duly necessitating its intervention, merely because one permanent member decides it would not be in its national interest to do so, and subsequently casts its negative vote. This issue is pertinent because an Article 39 determination is a prerequisite for the enforcement mechanism under Chapter VII, so the end result would be Council paralysis. Such a scenario illustrates an important yet recurring structural deficiency in the Council that existing doctrine in international law cannot mitigate.

Regardless of the seriousness of a situation, the Security Council is under no legal obligation to place a matter on its agenda, make a determination in terms of Article 39, or act upon such a determination. Consequently, the Security Council might be characterised as a politicised institution, and it seems to denote a group of organised rivalries, rather than an organised common place.

1.3 Problem statement

The UN Security Council exists for a purpose. It was created to be a prompt and effective mechanism to maintain international peace and security on behalf of UN member states: To protect common interests, as distinct from political interests. However, there are acute structural and procedural deficiencies in the Council's decision-making process that threaten its stability. The Council has often been criticised for its selective and at times inept performance, the lack of transparency in its procedures, and its privileges of tenure. These concerns culminate in questions of its legitimacy.

1.4 Research objective, aim and questions

The objective of this study is to develop an analytical framework of legitimacy for the Security Council. This model of legitimacy proposes a minimal threshold for the Council to legitimately exercise its discretion under Chapter VII of the Charter, as an extension of the Charter-based legal threshold, from which the Council derives its authority. The research aims to contribute to the new value-based approach to international law, through the sphere of legitimacy, whilst maintaining the coherence of the international legal order. The two main questions that are addressed in the study concern: The legal limitations to the Council's discretionary powers under Chapter VII of the Charter; and the moral and sociological limitations to the Council's discretionary powers under Chapter VII of the Charter. The results of which culminate in a framework of legitimacy for the Security Council.

1.5 Road map

In chapter 2, the study identifies limitations to the discretionary powers of the Security Council under Chapter VII of the Charter. These limitations are expressed under the auspices of international law in two related categories: the UN Charter, and *jus cogens*. The chapter examines the depth of these limitations through case reports, doctrine and literature, and in tandem describes how they affect the operations of the Council. The identified legal limitations are an integral feature of the Council's legitimacy, and lay the foundation for establishing the framework of legitimacy.

In chapter 3, the study develops the framework of legitimacy for the Security Council. The proposed criteria for legitimacy are expressed in three categories: instrumental, procedural and constitutional legitimacy. Each category represents a theme aligned to the structural and procedural deficiencies in the Council's decision-making process under Chapter VII of the Charter.

In chapter 4, the study concludes with an outline of the main arguments, and discusses opportunities for further research.

1.6 Research limitations

Legitimacy is a broad concept that cannot be assigned wholly. As wide perceptions of legitimacy change, so do the norms justifying authority in that context. Therefore, the legitimacy of the Security Council is not static. This impression of the Council's legitimacy both rationalises the present study, and exposes its limitations. As such, this research does not propose a definitive model of legitimacy, but rather one which seeks to bridge the gulf between the aspirations of the United Nations *vis-à-vis* the Security Council, and reality.

Secondly, the Security Council is a highly politicised institution which essentially depends on the world powers for various means of support, for it to function. Albeit, it is with no small measure of irony that the Council is conferred with unique legitimacy in the area of international peace and security, including the use of force in international law,⁶ while the military interventions in Kosovo (1999), Iraq (2003), and Syria (2015), are infamous examples of the fact that powerful states can disregard international law and the Charter regime with impunity.⁷ This “impunity gap” is an important theme concerning the Council’s legitimacy, but is beyond the scope of this study. Moreover, the impunity gap cannot be addressed without addressing issues concerning Council reform, which is also beyond the scope of this study.

⁶ See, e.g. United Nations Press Release [Online] “When force is considered, there is no substitute for legitimacy provided by the United Nations, Secretary-General says in General Assembly Address” 12 September 2002. Available from: <http://www.un.org/press/en/2002/SGSM8378.doc.htm> [Accessed: 20th April 2015].

⁷ *Quis custodiet ipsos custodes?* Literally translated as “Who will guard the guards themselves?” Juvenal (Satire VI, lines 374-8).

Chapter 2

International Law and the Powers of the Security Council

2.1 Introduction

Questions regarding the powers of the Security Council, have often been placed in the context of stimulating accountability and ensuring legitimacy.¹ At first glance, it would seem coherent to advance the notion that the collective security structure in the United Nations was designed to operate at the discretion of its permanent members.² The veto power attributed to these members in Article 27(3) of the UN Charter³ affirms this notion,⁴ and reflects the political nature of the Council's mandate.⁵ Albeit, such a notion is erroneous. This chapter examines limitations to the powers of the Security Council from the premise of international law.

The chapter commences with an overview of the legal framework within which the Council operates. This illustrates the principal features of the Council's authority. Thereafter, the chapter identifies limitations to this authority, and these are expressed under the auspices of international law, in two intertwined categories. Namely: the UN Charter and *jus cogens*.

¹ See, e.g. Dapo Akande *et al* "Old Questions and New Challenges for the U.N. Security System: The Role of the Security Council in the Light of the Charter's Reform" (2007) 5 *Journal of International Law and Policy* 1, pp.2-11. Available from: <https://www.law.upenn.edu/journals/jil/jilp/> [Accessed: 30th January 2015].

² The permanent members of the UN Security Council comprise of five members: China, France, Russian Federation, the United Kingdom and the United States of America.

³ United Nations (1945) *Charter of the United Nations*. Available from: <http://www.un.org/en/documents/charter> [hereinafter Charter] Art 27(3) reads *inter alia* that substantive decisions in the Security Council are to be made by an affirmative vote of seven members (now nine) including the concurring votes of the permanent members. However, it should be noted that the ICJ interpreted this provision as requiring only the absence of a negative vote by the permanent members. Therefore, a decision on a substantive matter would require an affirmative vote of nine members including either the concurrence or the abstention of the five permanent members. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, ICJ Reports 1971, 16 ff. at para 22 [hereinafter Namibia].

⁴ This is a dual sided coin. The veto power both empowers and disempowers the permanent members of the Council. Although the Charter does not expressly provide for a system of checks and balances analogous with municipal constitutional theory, the veto power attributed to the permanent members could be regarded as an indirect means of checks and balances within the Council itself. See W. Michael Reisman "The Constitutional Crisis in the United Nations" (1993) 87 *American Journal of International Law* 83, at 84. Available From: http://digitalcommons.law.yale.edu/fss_papers/886 [Accessed: 4th August 2014].

⁵ Erika de Wet *The Chapter VII Powers of the United Nations Security Council* (2004), pp. 134-135. *Studies in International Law* Volume 3, Portland Oregon: Hart Publishing. See also Arts 24 & 39 of the Charter.

The legal limitations alluded to in this chapter form an integral part of the Council's broad legitimacy, and serve as an introduction to the model of legitimacy which manifests in chapter three. However, due to the *ad hoc* nature of this study, and without prejudice to Chapter VI of the Charter (peaceful settlements of disputes), this chapter primarily focuses on limitations to the Council's powers under Chapter VII of the Charter.⁶

2.2 The Legal Framework

The Security Council is often referred to as a political organ,⁷ presupposing then, that its powers and functions are aligned to a form of international political authority or *droit politique*.⁸ The merits of these references are the subject of interpretation, but it is submitted that the term "political organ" in this instance is unhelpful. It denotes an understanding of authority that is founded on political considerations, as distinct from legal considerations. The Council is rather, a principal organ of the United Nations.⁹

The Council is not vested with legal personality, but derives its authority from the United Nations.¹⁰ Its acts, are those of the United Nations.¹¹

⁶ See De Wet *Id.* pp. 39-40. For De Wet, the purpose of separating Chapters VI and VII is to distinguish between voluntary and binding measures. Resolutions adopted under Chapter VI are generally categorised as recommendations, meaning that the effect of such a resolution is subject to the wilful consent of the parties involved. On the inverse, resolutions adopted under Chapter VII are generally categorised as binding measures, meaning that the effect of such a resolution is not underpinned by the consent of the parties involved. The binding nature of Chapter VII resolutions is important because it raises immediate concerns of legitimacy.

⁷ See, e.g. Bruce Cronin & Ian Hurd "Introduction" in Bruce Cronin & Ian Hurd (eds.) *The UN Security Council and the Politics of International Authority* (2008), at 17. Security and Governance Series. London and New York: Routledge. Available from: www.tandfebooks.com [Accessed: 2nd June 2014].

⁸ See Jean-Marc Coicaud *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility* (1997), at xxiv. Translated from French by David Ames Curtis (2004). Cambridge: Cambridge University Press. The term *droit politique* was initially utilised in the subtitle of Jean-Jacques Rousseau's *Treatise*; the standard translation of which is 'the principles of political right'.

⁹ Art 7(1) of the Charter.

¹⁰ See *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174 ff. pp. 178-185. The ICJ held that the UN is a subject of international law, capable of possessing international rights and duties. By this virtue, the Council, as an organ of the United Nations cannot hold separate legal personality.

¹¹ See UN Doc. A/66/10 (2011) Report of the International Law Commission 63rd session, *Text of the draft articles on the responsibility of international organisations with commentaries* [hereinafter DARIO], Arts 6-8, p. 55. & the commentary to Arts 6-8, pp. 84-96. In sum, these articles hold that the act of an organ of an international organisation, (undertaken in the performance of its functions) shall be considered an act of that international organisation under international law.

Members of the UN have conferred to it, primary responsibility for the maintenance of international peace and security, in order to ensure prompt and effective action in this regard.¹² The Council acts on the behalf of UN member states,¹³ and to this end, it may make recommendations and/or adopt decisions¹⁴ which are binding on those member states.¹⁵ The Council's authority to make recommendations and adopt decisions is discretionary,¹⁶ and thus argued to be of political character, devoid of legal judgment.¹⁷ But this discretion in itself does not absolve its acts from legal considerations or judgment.

Notwithstanding the predominant political character of its structure and functions, the Council operates within a legal framework, under the UN's constituent instrument, the UN Charter. Its powers (and the limits thereof), can presumably be found in the Charter. By that virtue, the Council is not *legibus solutus* or omnipotent. Suffice to say, the Council is an organ of the United Nations, and remains bound by international law.¹⁸

¹² Art 24(1) of the Charter.

¹³ *Id.* The Council has the legal authority to act on behalf of all 193 member states of the UN. Although, one will find that to date, 68 states have never in fact served a single term on the Council. See United Nations [Online] Available from: <http://www.un.org/en/sc/members/notelected.asp> [Accessed: 4th February 2015].

¹⁴ See generally, Chapters V and VII of the Charter. Under Chapter VII, the Council may make substantive recommendations (not legally binding but hold considerable political weight), and adopt substantive decisions (legally binding) provided these satisfy the voting requirements in Art 27(3). This distinction between the legal effects of Council recommendations and decisions was considered in *Chafiq Ayadi v Council of the European Union*, T-253/02, 12 July 2006 & *Faraj Hassan v Council of the European Union and Commission of the European Communities*, T-49/04, 12 July 2006.

¹⁵ See Arts 25, 48 & 103 of the Charter. The Charter not only provides that UN member states agree to accept and carry out the decisions of the Council (under Chapter VII), but it also provides a supremacy clause; where the Charter prevails, in the event of conflicting obligations with any other international agreement. See also UN Doc. A/CN.4/L.682 (2006) Report of the Study Group of the International Law Commission 58th session, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* [hereinafter *Fragmentation of International Law*], paras. 344-345. The prevalence of Charter obligations will not only suspend or set aside conflicting obligations, but the rights contained therein as well.

¹⁶ The Charter does not provide definitive legal criteria concerning the extent of the principal organ's procedural and substantive obligations. As such, its decisions are arguably "non-justiciable", and the subject of political considerations.

¹⁷ See Hans Kelsen *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1951), at 294. The London Institute of World Affairs, New York: F.A. Praeger. Kelsen contends that decisions adopted by the Council to maintain or restore international peace and security (except those aligned to the enforcement of ICJ decisions in terms of Art 94(2) of the Charter) are not necessarily identical with international law, and do not necessarily have to be in conformity with international law.

¹⁸ See Thomas M. Franck *Fairness in International Law and Institutions* (1995), pp. 218-219. Oxford: Clarendon Press.

This limitation on the Council's powers was explicated in early UN jurisprudence by the ICJ in the *Conditions of Admission* case:¹⁹

“The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers and criteria for its judgment.”

Understanding the scope of the Council's authority, is to understand its delegated nature. This enquiry has two dimensions. The first denotes the understanding that the Council's mandate to maintain international peace and security does not derive from some or other abstract value or political consideration, but is rather a duty established through international law, under the treaty of the United Nations, which sets out the content and parameters of this duty.²⁰ The second denotes the understanding that the drafters of the Charter intended the Council's powers to be broad and flexible, to enable it to promptly and effectively execute its mandate.²¹ In sum, it can be argued then, that the authority of the Council denotes both legal and political considerations. How these considerations interact, and thus influence the Council's authority is the subject of debate, but this enquiry is fundamental to delineate limitations on its powers. The ensuing sections in this chapter proceed with this enquiry.

¹⁹ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* Advisory Opinion, ICJ Reports 1948, 57 ff. at 64. These sentiments were echoed in *Prosecutor v Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, Appeals Chamber, at para. 28. Available from: <http://www.icty.org>.

²⁰ See Alexander Orakhelashvili “The Acts of the Security Council: Meaning and Standards of Review” (2007) 11 *Max Planck Yearbook of United Nations Law* 143, at 147. Koninklijke Brill N.V. Available from: http://www.mpil.de/shared/data/pdf/pdfmpunyb/04_orakhelashvili_11.pdf [Accessed 1st August 2014].

²¹ See Sir Michael Wood “The UN Security Council and International Law” (2006) Second Lecture: The Security Council's Powers and their Limits, para. 6. Hersch Lauterpacht Memorial Lectures, University of Cambridge. Available from: http://www.icil.cam.ac.uk/sites/default/files/LCIL/documents/lectures/2006_hersch_lecture_2.pdf [Accessed: 30th November 2014].

2.3 The UN Charter

As a matter of law, the Charter serves as a limitation to the Council's discretionary powers.²² However, any interpretation of the Charter should be based on good faith, ordinary meaning and context, in light of the Charter's object and purpose.²³ The Council's discretion under Chapter VII is twofold: when to act (Article 39), and how to act (Articles 40, 41 and 42).²⁴ The pertinent question that follows is where the limits to this discretion lie. The point of departure is Article 24 of the Charter. This holds that an act of the Council must conform to the maintenance of international peace and security.²⁵ Secondly, it holds that the Council must act in accordance with the purposes and principles of the Charter.²⁶

2.3.1 The Purposes and Principles of the Charter

In sum, the purposes of the Charter follow these thematic areas: international peace and security²⁷; justice and international law²⁸; the self-determination of peoples²⁹; socio-economic concerns;³⁰ and human rights.³¹ The principles of the Charter follow: the sovereign equality of member states³²; the principle of good faith³³; the peaceful settlement of disputes³⁴; the prohibition of the use of force and the territorial integrity of States³⁵; mutual

²² See Dire Tladi "Reflections on the rule of law in international law: The Security Council, international law and the limits of power" (2006) 31 *South African Yearbook of International Law* 231, at 233.

²³ Vienna Convention on the Law of Treaties (1969) 1155 *United Nations Treaty Series* 331 [hereinafter Vienna Convention], Art 31-32. Although Art 4 provides a non-retroactivity clause in respect of the Convention, Arts 31 and 32 of the Convention are widely accepted as customary international law, and thus applicable to the Charter. See, e.g. *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, ICJ Reports 1991, Judgment, 53 ff. para. 48. The ICJ stated in its judgment that Arts 31 and 32 of the Vienna Convention "may in many respects be considered as a codification of existing customary international law..." See also *Golder v United Kingdom*, Judgment, Merits and Just Satisfaction, European Court of Human Rights, 4451/70, 21 February 1975, paras. 29-30. The ECHR stated *inter alia*, that "Articles 31-33 [of the Vienna Convention] enunciate in essence generally accepted principles of international law."

²⁴ See Dire Tladi "Security Council, the use of force and regime change: Libya and Cote d'Ivoire" (2012) 37 *South African Yearbook of International Law* 22, at 24. See also De Wet (n 5) pp. 138-149 for an in depth analysis of the Council's discretion under Art 39.

²⁵ See Art 24(1) of the Charter.

²⁶ *Id.* Art 24(2).

²⁷ *Id.* Art 1(1).

²⁸ *Id.*

²⁹ *Id.* Art 1(2).

³⁰ *Id.* Art 1(3).

³¹ *Id.*

³² *Id.* Art 2(1).

³³ *Id.* Art 2(2).

³⁴ *Id.* Art 2(3).

³⁵ *Id.* Art 2(4).

assistance³⁶; the universality of the principles and purposes of the Charter³⁷; and the principle of non-intervention.³⁸

An initial reading of these together with Article 24 of the Charter, suggests that the primary purpose of the UN is international peace and security (which is the primary responsibility of the Council).³⁹ It seems coherent to accept the notion that this primary mandate may outweigh the organisations *secondary* responsibilities or principles. Perhaps with the exception of the principle of good faith. Even so, the purposes and principles seem to be very broad, general statements, as opposed to definitive legal constraints.⁴⁰

The restriction of “justice and international law” in Article 1(1) seems to be a constraint on the Council’s discretion under Chapter VI of the Charter, but not Chapter VII.⁴¹ In any event, the principle of *lex specialis*⁴² provides a caveat which in theory, would absolve the Council if it was to limit its adherence to general norms of international law, provided that such derogation is aligned with the “prompt and effective” performance of its responsibility under Chapter VII of the Charter.⁴³

³⁶ *Id.* Art 2(5).

³⁷ *Id.* Art 2(6).

³⁸ *Id.* Art 2(7).

³⁹ As deduced from both Art 1(1) of the Charter, and the first line of the Preamble of the Charter. Cf. Shabtai Rosenne *The Law and Practice of the International Court* (1985), at 73. 2nd Rev. Ed. Dordrecht: Martinus Nijhoff Publishers. The author notes that even though the Council has the primary responsibility for the maintenance of international peace and security under Art 24 of the Charter, this is not sufficient to give it exclusive competence over these matters.

⁴⁰ See Wood (n 21) at para. 21.

⁴¹ The provision in Art 36(3) (Chapter VI) of the Charter implies that legal disputes should not be adjudicated by the Council, but should rather be referred to the ICJ. However, Arts 40-42 (Chapter VII) do not mention or imply a similar requirement, but merely emphasise the wide discretion of the Council once the threshold in Art 39 has been triggered. Moreover, Art 91(1) of the Charter is seemingly non-consequential (in a positivistic sense) on the discretion of the Council under Chapter VII. It provides that the Council *may* request the ICJ to give an advisory opinion on any legal question, but this wording suggests that the Council is under no legal obligation to do so.

⁴² See *Fragmentation of International Law* (n 15) para. 56. *Lex Specialis* derives from the legal maxim “*lex specialis derogat lege generali*”. In principle, this means that a law governing a specific subject matter overrides a law governing general matters.

⁴³ See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, ICJ Reports 1986, 14 ff. para. 274. The ICJ affirmed the priority of treaty law over customary law, and accepted in principle, that general norms of international law may be derogated from, on the basis of *lex specialis*. See also *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, ICJ Reports 1969, 4 ff. paras. 61-72. The ICJ affirmed the priority of treaty law (para. 72) but also noted that “general customary law rules and obligations... by their very nature, must have equal force for all members of the international community” (para. 63).

There is also a presumption of validity associated with Council resolutions,⁴⁴ and any allegation to the contrary would require proof of motive,⁴⁵ which will be very difficult to satisfy, due to the nature of the Council's procedural obligations, as well as the political nature of an Article 39 determination.⁴⁶ Perhaps the restriction of justice and international law holds that the Council may not impose a settlement on parties to a dispute,⁴⁷ although this seems unlikely in the event that the Council is acting under Chapter VII.⁴⁸

As far as the constraints found in Articles 2(1) and 2(7) are concerned, it is widely accepted that state sovereignty may be limited by enforcement measures under Chapter VII of the Charter. Article 2(7) expressly provides a proviso to this effect.⁴⁹ Furthermore, developments in international law have reduced the importance of state sovereignty.⁵⁰ One author has argued that states recognise and accept that they are in fact not sovereign.⁵¹ But rather, "members of a sophisticated community with secondary rules and with what amounts to a constitution or ultimate rules of recognition."⁵² If this interpretation is accepted, states limit their sovereignty because they derive legitimacy from this membership.

⁴⁴ See *Namibia* (n 3) at para. 20. See also *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, Advisory Opinion of 7 June 1955, Separate Opinion of Judge Lauterpacht, ICJ Reports 1955, 90 ff. pp. 118-119. Judge Lauterpacht argued that although certain Council resolutions may not be legally binding, they do create *some* legal obligation, and member states have a duty to consider them in good faith.

⁴⁵ Proof that the respective resolution in question was not adopted in conformity with the maintenance of international peace and security, or not implemented in accordance with its intended objective, but directed towards an ulterior purpose.

⁴⁶ See Kelsen (n 17) at 294.

⁴⁷ See De Wet (n 5) at 194. Such a limitation is plausible under Chapter VI of the Charter, notwithstanding the application of Art 94(2), where the Council may enforce a decision of the ICJ. See also Art 36 of the Charter.

⁴⁸ See, e.g. UNSC Resolution 687, S/Res/687 (1991) & UNSC Resolution 833, S/Res/833 (1993) on the establishment of the Demarcation Commission for the Iraq-Kuwait boundary and the subsequent final report of the Demarcation Commission. The Council adopted a decision which in effect, ordered the demarcation of a boundary. The demarcation of the boundary (albeit a technical task), was not provisional, (as authorised by Art 40 of the Charter) but conclusive. Ultimately, the territorial dispute between Iraq and Kuwait was not concluded by way of agreement between the parties concerned. The legal conclusion finds that the Council, through resolutions 687 and 833 effectively imposed a settlement on the parties concerned.

⁴⁹ Art 2(7) of the Charter holds that the principle of non-intervention set out in that paragraph "shall not prejudice the application of enforcement measures under Chapter VII".

⁵⁰ See, e.g. De Wet (n 5) at 194. The author notes that, "systematic violations of international humanitarian law and human rights cannot be regarded as purely internal matters anymore."

⁵¹ Thomas M. Franck "Legitimacy in the International System" (1988) 82 *The American Journal of International Law* 705, at 755. Available from: <http://www.jstor.org/stable/2203510>. [Accessed: 2nd September 2014].

⁵² *Id.* at 755.

Albeit, the Council must respect the essence of state sovereignty, and this corresponds with the notion of territorial integrity provided in Article 2(4). For example, the Council may not apportion a part of a state territory to another, nor may it alter the borders of a state (except provisionally in terms of Article 40 of the Charter).

Article 2(2) of the Charter obliges the organisation (organs of the UN), and its members (individually), to perform their duties in good faith. This duty to act in good faith is a general principle of international law and is seemingly without exception.⁵³ The obligation of good faith in this instance corresponds to the Council's discretionary powers, but it is also closely related to expectations created *erga omnes*.⁵⁴ Some authors have likened the duty to act in good faith with the concept of equitable estoppel in international law.⁵⁵ This in effect, would oblige the Council to "fulfil legally relevant expectations" that are raised by its conduct, on the basis of legitimate expectation.⁵⁶ If this interpretation is accepted, international estoppel as an extension of the principle of good faith, may arguably limit the Council's discretion, and be utilised as a means of ensuring consistency in the Council.

On the other hand, it may be possible for the Council to act inconsistently in comparable situations or otherwise, due to political or other reasons. The issue of consistency as a constraint to the Council's discretion under Chapter VII of the Charter, was raised as a legal question in the *Tadic* case.⁵⁷ But the Tribunal found the allegation to be without legal merit, citing Article 39 of the Charter and concluding; the Council has "broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken," in each particular situation.⁵⁸

⁵³ See, e.g. Art 26 of the Vienna Convention. See also Ian Brownlie *Principles of Public International Law* (1990), at 19. 4th Ed. Oxford: Clarendon Press.

⁵⁴ See *Nuclear Tests (Australia v France)*, Judgment, ICJ Reports 1974, 253 ff. paras. 46-51.

⁵⁵ See, e.g. De Wet (n 5) pp. 195-200.

⁵⁶ *Id.* at 200.

⁵⁷ *Prosecutor v Dusko Tadic* (n 19) paras. 27-31.

⁵⁸ *Id.*

Alternatively, it is proposed that the obligation of good faith should be read in conjunction with Articles 94 and 96 of the Charter. In this instance, the limitation implies that the Council may not make recommendations or adopt decisions which are inconsistent with the ICJ's decision or judgment, on a legal question referred to it.⁵⁹

This approach is analogous with a form of distribution of powers, where the Council, if confronted with a legal question, *should* relinquish its title as adjudicator in respect of that question.⁶⁰ The Council cannot be some or other judicial forum of last instance,⁶¹ nor act in such a manner in the name of international peace and security, because its members are not independent. The Council has quasi-judicial competencies, as distinct from the ICJ which is the principal judicial organ of the UN.⁶² This is true, even if certain Council resolutions are binding upon member states, or the interpretation is accepted, that there is no hierarchical arrangement amongst the organs of the UN.⁶³

In sum, the broad substantive limitation of the purposes and principles of the Charter, is found in the understanding that the Council must balance the realisation of its primary responsibility with its secondary responsibilities (the purposes and principles of the UN).⁶⁴

⁵⁹ Cf. De Wet (n 5) pp. 183-184 & 190. The author suggests that the flexibility inherent Chapter VII of the Charter, means the Council is not required to evaluate the legal positions of parties, or the legal merits of the situation before taking action. See also Kelsen (n 17) at 294. Similarly, Kelsen contends that Council action under Chapter VII does not necessarily have to be conformity with international law. However, it is submitted that the limitation of good faith in context, requires the Council to refer legal questions to the ICJ for adjudication, and that there is some obligation which stems from the ICJ's determinations in this instance. International law cannot be seen as an impediment to prompt and effective action.

⁶⁰ This view is consistent with the provision for advisory opinions provided in Art 96 of the Charter.

⁶¹ See *Conditions of Admission Case* (n 19) 57 ff. From the outset, the ICJ has indicated that the political elements of a case would not circumvent the legal significance of that case, when a specific legal question is involved. Cf. De Wet (n 5) at 50. The author contends that a political dispute is one which could not be reduced to specific questions of facts or law. Whereas, a legal dispute is one which would imply both a legal and political answer. If this interpretation is accepted, the non-justiciable argument (whether a dispute is predominantly political and thus not within the ambit of the ICJ's jurisdiction) is futile from a pragmatic point of view, when that predominantly political question contains one or more legal questions.

⁶² See Kelsen (n 17) pp. 476-477. See, e.g. Art 92 of the Charter holds that the ICJ is the principal judicial organ of the UN, and forms an integral part of the Charter.

⁶³ See Rosenne (n 39) pp. 70-73. The author contends that each principal organ of the UN is *par inter pares*.

⁶⁴ De Wet (n 5) at 193. The author utilises a typical feature of constitutional interpretation to discern the scope of this limitation, and contends that the value of such an approach is found where varying responsibilities "can only be harmonised by a balancing of the different interest involved."

The Council may limit the specific application of certain purposes and principles of the Charter (when acting in conformity with its primary responsibility), but this may not result in an erosion of their core content.⁶⁵

2.4 *Jus Cogens*

It is widely accepted, that a category of peremptory norms exists in international law, termed *jus cogens*.⁶⁶ The Vienna Convention denotes the *essentialia* of *jus cogens* as: peremptory norms of international law; accepted and recognised by the international community as a whole; from which no derogation is permitted; and which can only be modified by a subsequent norm of international law having the same character.⁶⁷ Albeit, the precise legal content of this category of norms remains ambiguous, and as such, its effect in international law remains uncertain.⁶⁸ The ILC has indicated that the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination constitute those norms which presently meet the criteria for *jus cogens*.⁶⁹ Other possible candidates include; the prohibition of the use of force, and the rules prohibiting trade in slaves and piracy.⁷⁰ Albeit, there is no single authoritative list of *jus cogens*, nor is there universal acceptance on the criteria for that list.⁷¹

Notwithstanding this uncertainty, the Council's powers under Chapter VII of the Charter are limited by *jus cogens*. The constitutional element inherent in Article 103 of the Charter cannot in principle extend to *jus cogens* as peremptory norms.

⁶⁵ *Id.*

⁶⁶ See, e.g. UN Doc. A/56/10 (2001) Report of the International Law Commission 53rd session, *Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, paras. 2 to 5 of the commentary to Art 40, p. 112. The report states: “[t]he concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.”

⁶⁷ See Art 53 of the Vienna Convention.

⁶⁸ See Anthony Aust *Handbook of International Law* (2005), at 11. Cambridge: Cambridge University Press. The author notes that it is not the concept of *jus cogens* which is controversial, but rather its scope and applicability.

⁶⁹ See *DARIO* (n 11) para. 2 of the commentary to Art 26, p. 120.

⁷⁰ See, e.g. Ian Brownlie *Principles of Public International Law* (2003), at 515. 6th Ed. Oxford: Oxford University Press.

⁷¹ See UN Doc. A/09/10 (2014) Report of the International Law Commission 66th session, *Annex: Jus Cogens* by Dire Tladi, at 274 ff. See also, *Fragmentation of International Law* (n 15) para. 375.

Doctrine and practice in international law assert that conflicts between Charter obligations and norms of *jus cogens* result in the invalidity of those conflicting Charter obligations.⁷² Suffice to say, *jus cogens* operate as a concept superior to general international law, customary law and treaty law.⁷³

2.5 Concluding remarks

The Charter limits the Council's discretion through its purposes and principles. The Council's discretion is also limited by peremptory norms in international law, termed *jus cogens*. As evidenced above, it may seem contextually unsound to hold the Council in contempt of Article 24(2) of the Charter, if its behaviour is aligned to the maintenance of international peace and security. Similarly, the extent of the limitation provided by *jus cogens* remains unclear, in the sense that the category of norms constituting *jus cogens* remain ill-defined and presumed.⁷⁴ Albeit, the Council has a duty to respect the essence of the purposes and principles of the Charter, as a matter of policy. The alternative, would render the proviso in Article 24(2) redundant. Furthermore, the Council has a duty to adhere to *jus cogens* as peremptory norms, and possibly in terms of the category commonly referred to by the ILC and the ICJ.⁷⁵ These limitations on the Council's discretion form an integral part of its broad legitimacy, and serve as introduction to the model of legitimacy which manifests and in the following chapter.

⁷² See, e.g. *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Case T-306/01, Judgment of the Court of First Instance (Second Chamber, Extended Composition) 21 September 2005 at para 281. See also, Art 64 of the Vienna Convention.

⁷³ See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*, Further Request for the Indication of Provisional Measures, Order of 13 September 1993, Separate Opinion of Judge Lauterpacht, ICJ Reports 1993, 407 ff. para. 100.

⁷⁴ See, e.g. Tladi (n 71) pp. 274-275.

⁷⁵ See, e.g. Report of the ILC 53rd session (n 66) para. 5 of the commentary to Art 26, p. 85.

Chapter 3

The Legitimacy of the Security Council

3.1 Introduction

The preceding chapter described legal limitations to the Council’s discretion under Chapter VII of the Charter. It also indicated that these limitations form an integral part of the Council’s broad legitimacy. This chapter develops a model of legitimacy for the Council, which encompasses legal, moral and sociological aspects. The chapter commences with an overview of legitimacy as a concept and its relationship with international law. This clarifies the intricate relationship between legitimacy and legality. Thereafter, the chapter expounds on the two dominant conceptions of legitimacy. Namely: normative and descriptive legitimacy. Following this analysis, the chapter introduces the content of the proposed model of legitimacy for the Council. Three traditions are at the heart of this model. These are the instrumentalist, procedural and constitutional traditions respectively. In sum, this chapter proposes a minimal threshold for the Council to legitimately exercise its discretion, as an extension of the Charter based legal threshold, from which the Council derives its authority.

3.2 Legitimacy and Legality

The concept of legitimacy in the international system involves the right to exercise collective governance.¹ For Franck, legitimacy “accommodates a deeply held popular belief that for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted and applied.”² Buchanan describes legitimacy as “being morally justified in the attempt to make, apply, and enforce general rules within a jurisdiction.”³

¹ See Daniel Bodansky “Legitimacy in International Law and International Relations” in Jeffrey L. Dunoff & Mark A. Pollack (eds.) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013), at 324. New York, NY: Cambridge University Press.

² Thomas M. Franck *Fairness in International Law and Institutions* (1995), pp. 7-8. Oxford: Clarendon Press.

³ Allen Buchanan *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2004), at 187. Oxford Political Theory Series. Oxford: Oxford University Press.

While Suchman defines legitimacy as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.”⁴ If these notions of legitimacy are accepted, the right to exercise collective governance encompasses legal, moral and sociological considerations. It follows that an institution derives its legitimacy from a particular historical context, cultural origin, convention or justificatory structure.⁵ These factors serve as the authoritative source, which morally justifies the institution to exercise its authority.⁶ Therefore, notions of legitimacy might be approached strategically, to either empower or disempower an institution.⁷

One author has likened the concept of legitimacy to the “principles of political right”.⁸ Others have framed legitimacy in terms of compliance.⁹ This approach is analogous with the “service conception” of authority theorised by Joseph Raz.¹⁰ Consider two reasons why the South African judiciary might accept a decision of the International Criminal Court (ICC). The judiciary might be persuaded by the ICC’s reasoning, or the judiciary might view the ICC as an authoritative source. The latter reason for acceptance concerns the ICC’s legitimacy, while the former does not. The ICC is legitimate because its decisions are authoritative. This is so even if those decisions fail to convince the audience to whom they are addressed.¹¹

⁴ Mark C. Suchman “Managing Legitimacy: Strategic and Institutional Approaches” (1995) 20 *The Academy of Management Review* 571, at 574. Available from: <http://amr.aom.org/content/20/3/571>. [Accessed: 30th January 2015].

⁵ Andrew Hurrell “Legitimacy and the Use of Force: Can the Circle Be Squared?” (2005) 31 *Review of International Studies* (special issue) 15, at 29.

⁶ *Id.* at 24. The author posits that “legitimacy is about providing persuasive reasons as to why a course of action, a rule, or a political order is right and appropriate”.

⁷ See Ian Hurd *After Anarchy: Legitimacy and Power in the United Nations Security Council* (2007), at 30. Princeton: Princeton University Press. The author contends that legitimacy may either be approached as “an explanation for individual behaviour or as an element in the domination strategy used by leaders.”

⁸ Jean-Marc Coicaud *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility* (1997), at xxiv. Translated from French by David Ames Curtis (2004). Cambridge: Cambridge University Press.

⁹ See, e.g. Thomas M. Franck *The Power of Legitimacy among Nations* (1990), at 3. Oxford: Oxford University Press. See also Hurd (n 7) at 30. For Hurd, legitimacy refers to “the belief by an actor that a rule or institution ought to be obeyed.”

¹⁰ Joseph Raz *The Morality of Freedom* (1986), part one. New York, NY: Oxford University Press. In context, this theory implies that an institution is legitimate when: a) a state will do better following its directives, than it would if it were to act for independent reasons, and b) the institution takes those independent reasons into consideration when it issues its directives. This in turn, implies a content-independent duty to obey/accept the decisions of the institution in question.

¹¹ See Bodansky (n 1) at 326.

As Bodansky notes: “saying that a decision or norm is legitimate... isn’t asserting that the decision is correct as a matter of substance- for example, because it is just or efficient. Instead, one is saying that the author of the decision has a right to rule.”¹²

Legitimacy is a multifaceted and interdisciplinary concept which encompasses legal, moral and sociological criteria.¹³ For example, in international law legitimacy is primarily concerned with formal legality through established rules, procedures and due process.¹⁴ In international relations legitimacy is primarily concerned with moral justifications through normative criteria,¹⁵ while in social science legitimacy is concerned with the belief of legitimacy through empirical evidence.¹⁶ This multifaceted interpretation of legitimacy is aligned to possible discrepancies between the rules or the behaviour of an institution, and the underlying values or beliefs associated with that institution.¹⁷ In this way it follows a common goal of positivism, as it separates what is legally required from what is desirable or acceptable. However, the basis of this distinction is not to endorse or reject legal formalism, but to rationalise the sense of obligation and acceptance generated by international law and international institutions.¹⁸ This rationalisation manifests as the concept of legitimacy.

In theory, the relationship between law and legitimacy is complex. On one hand, legality seems to be more than legitimacy, because without the formalisation that legality constitutes, legitimacy would be nothing more than an empty shell. On the other hand, legitimacy seems to be more than legality, because a law absent legitimacy, is devoid of authority.

¹² *Id.*

¹³ See David Beetham *The Legitimation of Power* (2013), at 20. 2nd Ed. London: Palgrave Macmillan. The author posits that legitimacy is not something that institutions possess or lack, but rather a set of criteria that justify the authority of the institution in question.

¹⁴ See, e.g. Thomas M. Franck “Legitimacy in the International System” (1988) 82 *The American Journal of International Law* 705, at 706. Available from: <http://www.jstor.org/stable/2203510>. [Accessed: 2nd September 2014].

¹⁵ See, e.g. Buchanan (n 3) pp. 187 ff.

¹⁶ See, e.g. Max Weber *Economy and Society: An Outline of Interpretive Sociology* (1922). Translated from German by Guenther Roth & Claus Wittich (eds.) (1968). New York, NY: Bedminster Press.

¹⁷ Beetham (n 13) at 12. See also, Hurrell (n 5) at 16. Hurrell argues that legitimacy “is what people accept because of some normative understanding or process of persuasion,” where “justifying and reason-giving are fundamental”.

¹⁸ See Jutta Brunnée & Stephen J. Toope *Legitimacy and Legality in International Law: An Interactional Account* (2010), at 46. New York, NY: Cambridge University Press.

In sum, legality and legitimacy seem to be mutually reinforcing. Legality is an essential component of legitimacy in the sense that it contains an important social element, by creating expectations and providing certainty in international relations. Similarly, legitimacy is an essential component of legality, in the sense that international law should bind those to whom it applies.¹⁹ Otherwise, international law would not be law in its true sense, and it would lose its legitimacy. Why would powerful states follow powerless rules?²⁰ One author summarises this relationship, stating: “the more a law is resorted to as the source of legitimacy, the more necessary it becomes for the law to be complied with for its legitimacy to be maintained”.²¹

However, it is possible for both concepts to exist independently, and this was exemplified through NATO’s military intervention in Kosovo. In October 2000, the Independent International Commission on Kosovo published its report, whose foremost conclusion was that “the intervention was legitimate, but not legal given existing international law.”²² This report is important for context, because it uncouples legitimacy from legality and confirms that they are conceptually distinct concepts.²³

¹⁹ See Samantha Besson “Institutionalising global *demoi*-cracy” in Lukas H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (2009), at 60. New York, NY: Cambridge University Press.

²⁰ See Franck (n 9) at 3. The author proposes this question, whilst framing the concept of legitimacy in terms of compliance.

²¹ Matilde P. Herranz “The Security Council and the Legitimacy of the Use of Force: Legal, Normative, and Social Aspects” (2010) Working Paper No. 2010/9 *International Catalan Institute for Peace*, at 11. Available from: <http://ssrn.com/abstract=1884196> [Accessed 4th February 2015].

²² Independent International Commission on Kosovo *The Kosovo Report: Conflict, International Response, Lessons Learned* (2000), at 289 ff. New York, NY: Oxford University Press. The Commission also stressed the need to “close the gap between legality and legitimacy.”

²³ See Ramesh Thakur “Law, Legitimacy and United Nations” (2010) 11 *Melbourne Journal of International Law* 1, at 11. Available from: <http://www.law.unimelb.edu.au/files/dmfile/download0a61.pdf> [Accessed: 30th August 2014]. Thakur argues that the intervention in Kosovo raised a “triple policy dilemma” concerning legitimacy in the international system: 1) To respect sovereignty is sometimes to be complicit in humanitarian tragedies; 2) To argue that that UNSC must give its consent to international intervention for humanitarian purposes is to risk policy paralysis; and 3) To use force in this instance without Council authorisation is to violate international law and undermine world order.

3.3 Conceptions of Legitimacy

As a point of departure, it is pertinent to distinguish between legitimacy as a concept, and conceptions of legitimacy as the content of that concept. Having described the concept of legitimacy and its relation to international law in the preceding section, this section discusses the conceptions of legitimacy. As noted above, the concept of legitimacy in the international system involves the right to exercise collective governance. This right is comprised of legal, moral and sociological considerations. These conceptions of legitimacy are commonly expressed in two categories. Namely: normative legitimacy, and descriptive (sociological) legitimacy.²⁴

An institution is legitimate in the normative sense, if it has the “right to rule” within a given domain.²⁵ This is an objective enquiry, founded on legal, moral and political theory.²⁶ It focuses on the qualities of the ruler,²⁷ and requires an institution to have some normative justification in its exercise of authority.²⁸ In contrast, an institution is legitimate in the descriptive sense, if it is widely believed to have the “right to rule”.²⁹ This is a subjective enquiry which focuses on the outlook or perceptions of the ruled, rather than the qualities of the ruler.³⁰

The relationship between these conceptions of legitimacy is complex. If descriptive legitimacy simply means “belief of legitimacy”, then it becomes dependant to some degree on normative legitimacy, i.e. “what is legitimate”. As Applbaum notes, descriptive legitimacy describes views about normative legitimacy, and this enquiry precludes claims as to the meaning of legitimacy in that particular context.³¹ If this interpretation is accepted, perceptions of legitimacy seem inadequate for an objective assessment of the legitimacy of a norm or institutional arrangement.

²⁴ See Bodansky (n 1) at 327 (fn. 9). The author notes that legitimacy “is one of the few words that refer both to beliefs and to the thing about which beliefs are held, and a considerable amount of confusion might be avoided if different terms were used to refer to normative and descriptive legitimacy.”

²⁵ Allen Buchanan & Robert O. Keohane “The Legitimacy of Global Governance Institutions” in Lukas H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (2009), at 29. New York, NY: Cambridge University Press.

²⁶ See Bodansky (n 1) pp. 326-327.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Buchanan & Keohane (n 25) at 29.

³⁰ See Bodansky (n 1) at 327.

³¹ Arthur I. Applbaum “Legitimacy in a Bastard Kingdom” (2004) *Center for Public Leadership Working Papers Series 74*, at 79. Available from: <http://hdl.handle.net/1721.1/55927> [Accessed: 30th November 2014].

They are the result of subjective views about the normative conditions of legitimacy, which would inevitably vary between international actors of different standing in the international system.

However, the perception of legitimacy is important because it has the potential to enhance or undermine the effectiveness or stability of an institution.³² For example, if the UN is perceived as illegitimate “the Security Council would still be able to order governments about, but its orders would have lost their international sheen and look more like big-power bullying.”³³ Perceptions of illegitimacy seem to arise from deep dissatisfaction or wide criticism of the institution in question.³⁴ Albeit, the perceived legitimacy of an institution must depend on reasons other than self-interest.³⁵ It follows, that isolated allegations of illegitimacy are likely to have little significance on the perceived legitimacy of an institution as a whole.³⁶ Perceptions of illegitimacy must resonate substantially with international actors

³² See UN Doc. A/59/565 (2004) Report of the High-Level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility* [hereinafter High-Level Panel Report], para. 204. Available from: www.unrol.org [Accessed: 14th December 2014]. This report noted that “the effectiveness of the global collective security system... depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy — their being made on solid evidentiary grounds, and for the right reasons, morally as well as legally.” See also David D. Caron “The Legitimacy of the Collective Authority of the Security Council” (1993) 87 *American Journal of International Law* 552, at 558. Available from: <http://scholarship.law.berkeley.edu/facpubs/1642> [Accessed: 30 Aug 2014]. The author contends that the perceived legitimacy of the Council may influence both “the willingness of states to obey and support particular decisions... and its future use generally.”

³³ See “Open the Club” *The Economist*, 29 August 1992, at 14.

³⁴ See Caron (n 32) at 559. The author suggests that perceptions of illegitimacy seem to manifest “a sense of betrayal of what is believed to be the promise and spirit of the organization.” However, the author also notes that the determinants of perceptions of legitimacy in practice remain unclear.

³⁵ See Hurrell (n 5) at 16. The author contends that the concept of legitimacy should be distinguished from “purely self-interested” behaviour on one hand and “straightforward imposed or coercive rule” on the other. Cf. Buchanan & Keohane (n 25) pp. 32-33. The authors contend that the concept of legitimacy “allows various actors to coordinate their support for particular institutions by appealing to their common capacity to be moved by *moral reasons*, as distinct from purely strategic or exclusively self-interested reasons.” Therefore, the concept of legitimacy “is a moral notion that cannot be reduced to self-interest”.

³⁶ See, e.g. “Walkout at U.N. as Ahmadinejad speaks” *CNN*, 23 September 2011. Available from: <http://edition.cnn.com/2011/WORLD/meast/09/22/un.ahmadinejad/> [Accessed: 27 April 2015]. The former Iranian President Mahmoud Ahmadinejad made several allegations purporting the illegitimacy of the UN while addressing the General Assembly in 2011, but these had little effect on the perceived legitimacy of the UN as a whole. See also Caron (n 32) at 559. Caron notes that although the identity of the actor alleging illegitimacy influences how that allegation will be received (e.g. allegations made by totalitarian regimes will likely be discounted from the outset), the author also notes that the challenge in international governance is not to merely discredit certain actors, but to address the “echo” (how other more influential and central actors react upon hearing such an allegation). It is this echo that determines the significance of allegations of illegitimacy.

as a collective. Therefore, non-normative factors may be significant in causing an institution or norm to be perceived as legitimate.³⁷

In sum, it is insufficient for an institution to merely be legitimate. It must also be perceived as legitimate. Normative and descriptive legitimacy seem to be co-dependent. The belief of legitimacy relies on perceptions of the normative conditions of legitimacy. Similarly, the normative conditions of legitimacy rely on perceptions of legitimacy. They would cease to be normative and thus legitimate if no one accepts them as such. This co-dependency suggests that the legitimacy of a norm or institutional arrangement is not static. Legitimacy is a broad concept that cannot be assigned wholly. As beliefs of legitimacy change in a particular context, so do the norms justifying authority in that context.

3.4 The Legitimacy of the Security Council

The preceding sections of this chapter articulated the concept of legitimacy in the international system as a multifaceted concept which comprises of legal, moral and sociological aspects. This section advances a model of legitimacy for the Council based on this understanding. As noted above, this model of legitimacy proposes a minimal threshold for the Council to legitimately exercise its authority. The proposed criteria for legitimacy are expressed in three categories. Namely: the instrumental, procedural and constitutional components of legitimacy.

3.4.1 Instrumental Legitimacy

In its traditional sense, the instrumental notion of legitimacy derives from the satisfaction of perceived self-interests.³⁸ Consequently, international actors will accept the Council as legitimate to the extent that it generates outcomes from which they stand to benefit.³⁹

³⁷ See, e.g. Franck (n 14) pp. 725-726. Franck contends that the perceived legitimacy of an international institution depends on process determinacy, symbolic validation, ritual and pedigree. See also Brunnée & Toope (n 18) at 32. The authors contend that legitimacy in the international system depends on “some degree of social consensus, expressed in practice.”

³⁸ See Hurd (n 7) at 67.

³⁹ *Id.*

This notion of legitimacy follows the “service conception” of authority,⁴⁰ and is analogous with the “favourable outcomes” or “output-based” approaches to legitimacy.⁴¹ The instrumental hypothesis has strong appeal because it provides a *prima facie* explanation as to why the Council might be accepted as legitimate by some states and not by others.⁴² However, a concept of legitimacy which depends purely on self-interest is inadequate because the Council functions on behalf of a community of states with varied interests.⁴³ Therefore, in adopting the outcomes-based approach inherent in the instrumental notion of legitimacy, this study proposes that a component of legitimacy for the Council depends on a value-based standard that must be satisfied for it to maintain its legitimacy.

This value-based standard of legitimacy is founded on the understanding that the collective security structure in the Council operates as mechanism to protect common interests, as distinct from a mechanism to protect political interests.⁴⁴ These common interests are recognised as international norms with a strong ethical underpinning, which have been established for the protection of the international community as a whole.⁴⁵

The value-based standard of legitimacy creates a moral obligation in favour of UN member states. In its broad sense, it encompasses two related factors concerning the purpose of the Security Council and its performance.⁴⁶

⁴⁰ See Raz (n 10) for a description of the service conception of authority.

⁴¹ See Hurd (n 7) pp. 67-69.

⁴² For example, the permanent members of the Security Council might accept the decisions of the institution as legitimate, because their influence and participation in the decision making process is substantial. Similarly, less influential states with limited rights of participation in the decision making process, might not as easily accept the institution as legitimate. Especially if the Council’s decisions are in direct conflict with their interests or perceptions of justice.

⁴³ See Hurrell (n 5) at 16. Support for the Council must be based on reasons other than self-interest or coercion. See also, Buchanan & Keohane (n 25) at 33. The authors posit that this understanding of legitimacy may make an institution more stable, and thus more effective.

⁴⁴ See United Nations (1945) *Charter of the United Nations* [hereinafter Charter], Art 24. The value-based standard of legitimacy follows teleological reasoning, where moral justifications of the Council’s authority are guided and influenced by the goals it is intended to achieve. See also Caron (n 32) pp. 560-561. An institution is created for a purpose and it is delegated a measure of authority to serve that purpose. Caron argues that the failure/inability of an institution to serve its purpose, “has long been a basis for alleging that the order is illegitimate”. This is particularly relevant for an international governance institution such as the Security Council, which aspires to represent a system of order.

⁴⁵ See Erika de Wet “The International Constitutional Order” (2006) 55 *International and Comparative Law Quarterly* 51, at 57. De Wet contends that this category of international norms includes *jus cogens* norms and *erga omnes* obligations. The author also notes that these norms “constitute a fundamental yardstick for post-national decision-making.”

⁴⁶ Cf. Bruce Cronin & Ian Hurd “Conclusion: Assessing the Council’s authority” in Bruce Cronin & Ian Hurd (eds.) *The UN Security Council and the Politics of International Authority* (2008), pp. 206-208. Security and

The first factor is normative and holds that its behaviour must not violate the common interests of UN member states (international norms with a strong ethical underpinning). On the inverse, the second factor holds that perceptions of its legitimacy may diminish if it fails to act consistently with these common interests (the legitimate expectation of UN member states).

For purposes of the present discussion, the international norms that constitute the essence of these common interests, are encapsulated as human rights.⁴⁷ This assertion follows developments in the international legal order, which have resulted in the emergence of a value system concerned with the special hierarchical standing of certain fundamental norms having *erga omnes* effect.⁴⁸ Human rights have manifested as insignia of a new, value-based international law, distinct from the traditional state-centred model of international law.⁴⁹ As Tladi notes, this new value-based international law has elevated principles such as the Responsibility to Protect (RtoP) and the Protection of Civilians.⁵⁰

Governance Series. London and New York: Routledge. Available from: www.tandfebooks.com. [Accessed: 2nd June 2014]. The authors argue that the following factors are relevant to the perceived legitimacy of the Council: transparency and inclusion in the deliberation process, consistency with the broader norms and values of the international society (what the authors term purposive legitimacy), and consistency with the norms and expectations of the institutions membership (what the authors term performance legitimacy).

⁴⁷ Cf. De Wet (n 45). See also, Buchanan (n 3) at 88. The author argues that the moral theory of international law is based on two considerations: 1) justice (which the author understands as the respect for basic human rights), and 2) access to justice (the moral obligation to ensure that all persons have access to institutions of justice- understood chiefly as institutions that protect their basic human rights).

⁴⁸ Human rights form an integral component of the international system. See Art 1(3) of the Charter read in conjunction with Arts 55, 56, 62 and 68. See also, De Wet (n 45) at 57. The author notes that the United Nations system has promoted human rights in a manner which has “elevated them to core elements of the international value system.” This “elevation” of human rights norms has also occurred through the wide adoption of several human rights instruments. See, e.g. the Universal Declaration of Human Rights (1948), the Covenant on Civil and Political Rights (1966), the Covenant of Economic, Social and Cultural Rights (1966).

⁴⁹ See Dire Tladi “Security Council, the use of force and regime change: Libya and Cote d’Ivoire” (2012) 37 *South African Yearbook of International Law* 22, at 29. The author suggests that the value-based model of international law operates in tandem with the traditional conception of state sovereignty, but this new value-based international law recognises that state sovereignty comes with responsibilities (understood chiefly as respect for basic human rights).

⁵⁰ *Id.* at 29 ff. These principles are interrelated, but distinguishable by the fact that the Protection of Civilians principle (generally understood as peacekeeping operations) is limited to conflict situations as defined in international humanitarian law, while the RtoP principle can apply outside the context of a conflict.

The RtoP principle rests on three pillars which were unanimously adopted by world leaders at the 2005 UN World Summit.⁵¹ The third pillar is important for the present discussion as it seems to impose a moral obligation on the international community, to take timely and decisive action (through the UN) to protect civilians from *fundamental human rights violations* (where a state or any other party to a conflict fails to do so).⁵² To that end, the Council has endorsed RtoP to some extent in practice, although not in a clear or consistent manner.⁵³ Notwithstanding, it seems coherent to accept the notion that fundamental human rights violations (domestic or international) may constitute a threat to international peace and security.⁵⁴ But as Tladi notes, “when push comes to shove, the Security Council will *always* subjugate human rights issues to its core issues and, not only is it within powers to do so, but its very limited mandate may require it to do so”.⁵⁵

Albeit, if the RtoP principle is founded on the protection of fundamental human rights, it seems plausible to include RtoP in the category of common interests (international norms with a strong ethical underpinning).⁵⁶ Conceptually, the RtoP principle embodies the ethos and shared expectations of the international community.⁵⁷

⁵¹ See UNGA Resolution 60/1, A/RES/60/1 (2005) *World Summit Outcome Document*, paras. 138-139 [hereinafter *World Summit Outcome Document*].

⁵² *Id.* at para. 139. The term “fundamental human rights violations” is used to denote the four crimes applicable to the RtoP principle (genocide, war crimes, ethnic cleansing and crimes against humanity) as defined in Arts 6-8 of the Rome Statute of the ICC. Although ethnic cleansing is not specifically defined in the Rome Statute, it is widely accepted as a product or variant of those crimes defined in the Statute.

⁵³ See, e.g. UNSC Resolution 1973, S/Res/1973 (2011) concerning Libya, and UNSC Resolution 1975, S/Res/1975 (2011) concerning Cote d’Ivoire. Both resolutions reflected the essence of the RtoP principle, and more critically, both resolutions recognised the responsibility of the International community to “take all necessary measures...” (Res. 1973) and to “use all necessary means...” (Res. 1975), including the use of force to ensure the protection of civilians in a conflict. However, Resolution 1973 was not crafted in a manner which assigned the responsibility to protect civilians upon the Security Council or UN member states. Instead, this was to be carried out by a “coalition of the willing and able”. Similarly, Resolution 1975 did not assign responsibility upon the Council or UN member states. Instead, this was to be carried out by a UN mission (UNOCI).

⁵⁴ See Tladi (n 49) pp. 31-32. Following developments in international relations, internal conflicts are generally accepted as having an international dimension or international implications, so the internal (domestic) nature of a conflict would not preclude the applicability of Chapter VII of the Charter.

⁵⁵ Dire Tladi “South African lawyers, values and new vision of international law: The road to perdition is paved with the pursuit of laudable goals” (2008) 33 *South African Yearbook of International Law* 167, at 180.

⁵⁶ See *World Summit Outcome Document* (n 51), paras. 138-139. See also UN Doc. A/63/677 (2009) Report of the Secretary-General, *Implementing the Responsibility to Protect*, Part 1 para. 10(c). Available from: www.unrol.org [Accessed: 22nd January 2015]. Conceptually, RtoP is a universal and enduring principle. As the Secretary-General noted, the scope of RtoP is narrow, but its response “ought to be deep.”

⁵⁷ *Id.*

These shared expectations follow international norms embedded in the UN Charter, international humanitarian law and several human rights conventions.⁵⁸ If this interpretation is accepted, the Council is morally obliged to take timely and decisive action to protect civilians in accordance with the RtoP principle. If the Council fails to act consistently with the RtoP mandate (understood as a common interest), perceptions of its legitimacy may diminish in terms of the value-based standard of legitimacy.⁵⁹

However, it is pertinent to note, that situations which amount to violations of fundamental human rights, will not *ipso facto* constitute a threat to international peace and security.⁶⁰ As Tladi notes, “in any given situation, before the Council takes up a matter, a link between the situation and a threat to international peace must be shown.”⁶¹ It is only once this link is established, can the Council place the situation on its agenda. Moreover, even if this link is established, it is within the Council’s discretion to place the situation on its agenda and subsequently decide what measures, if any are to be taken.⁶²

It is also pertinent to note, that while the Council is primarily responsible for the maintenance of international peace and security, the obligation which stems from RtoP is borne by the international community as a whole. In certain matters, the “good offices of the Secretary-General” and the UN Human Rights Council, may be more appropriate forums to address the situation.⁶³ One author contends that it is the combination of political action by the Security

⁵⁸ See Edward C. Luck, Special Advisor to the Secretary-General *Remarks to the General Assembly on the Responsibility to Protect* (2009), at 3: “[RtoP] is a political, not legal, concept based on well-established international law and the provisions of the UN Charter.” Available from: <http://www.un.org/ga/president/63/interactive/protect/luck.pdf> [Accessed: 15 January 2015].

⁵⁹ See Ernst B. Haas *When Knowledge is Power: Three Models of Change in International Organizations* (1990), at 87. Berkeley: University of California Press. The authors approach to legitimacy is analogous with the imposition of this moral obligation. For Haas, legitimacy “exists when the membership values the organization and generally implements collective decisions because they are seen to serve the members’ values.”

⁶⁰ See Dire Tladi “Strict positivism, moral arguments, human rights and the Security Council: South Africa and the Myanmar vote” (2008) 8 *African Human Rights Law Journal* 23, at 34-35.

⁶¹ *Id.* at 35.

⁶² *Id.* Tladi notes that the Council’s discretion in this instance does not depend on international law or human rights considerations, “but rather on political considerations, flowing from the interests of the five permanent members.” Cf. Anne Peters “The Security Council’s Responsibility to Protect” (2011) 8 *International Organizations Law Review* 15, at 34 ff. The author contends that the Council’s margin of discretion to place a situation on its agenda is within *legal* limits. She argues that “a blatant failure to label a factual situation and to apply the appropriate legal concept to the facts means overstepping the legal limits of the leeway inherent in any interpretation and application of the law.” This assertion seems doubtful from a literal or textual interpretation of the Charter, but within the sphere of legitimacy it seems coherent, that in the proverbial sense the Council should be morally obliged to call a spade a spade.

⁶³ See Tladi *Id.* at 32. Cf. John Dugard “The Future of International Law: A Human Rights perspective- With Some Comments on the Leiden School of International Law” (2007) 20 *Leiden Journal of International Law* 729,

Council, and diplomatic action by the UN Secretariat that enables the UN to effectively contribute to conflict resolution.⁶⁴

Albeit, RtoP remains a moral obligation and a legitimate expectation, so if the Council fails to act in accordance with RtoP in an applicable situation, (i.e. where the criteria for RtoP as defined are evident, where the situation meets the threshold in Article 39, and where diplomatic measures have failed to produce meaningful results) its legitimacy in that instance depends on a moral obligation to justify its inaction. The ensuing section discusses this procedural component of its legitimacy.

3.4.2 Procedural Legitimacy

As discussed in the preceding chapter, the Council has wide discretion under Chapter VII of the Charter. Neither the Charter⁶⁵ nor the Council's rules of procedure⁶⁶ oblige the organ to act in circumstances which seem to fall within the scope of its mandate.⁶⁷ Moreover, the Council is not obliged to act in a consistent manner, nor is it obliged to disclose or justify the reasons behind its behaviour.⁶⁸ However, legitimacy conceptually extends beyond the limits of what is legally required.⁶⁹ Even if the Council's behaviour conforms to the established rules in the Charter and its provisional rules of procedure, it may still be viewed as illegitimate against some broader frame of reference.⁷⁰

at 733. Dugard contends that the "main human rights offenders remain beyond the reach of human rights conventions or the Rome Statute and only the political organs of the United Nations may take action against them." See, e.g. Norimitsu Onishi "Omar al-Bashir, Leaving South Africa, Eludes Arrest Again" *The New York Times*, 15 June 2015. Available from: <http://www.nytimes.com> [Accessed: 22nd July 2015].

⁶⁴ See Bruce D. Jones "The Security Council and the Arab-Israeli Wars: Responsibility without Power" in Vaughan Lowe *et al* (eds.) *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (2008), 298-313. Oxford: Oxford University Press.

⁶⁵ See Arts 27-32 of the Charter. Art 30 permits the Council to determine its own agenda and methods of procedure.

⁶⁶ See generally UN Doc. S/96/Rev.7 (1982) *Provisional Rules of Procedure of the Security Council*. Available from: <http://www.un.org/en/sc/about/rules/>. See also United Nations [Online] *Highlights of Security Council Practice* (2014) Available from: <http://www.un.org/en/sc/documents/highlights.shtml> [Accessed: 2 April 2015].

⁶⁷ The Security Council is exclusively competent to determine whether a situation meets the threshold found in Art 39 of the Charter, and what action to take if such a determination is made. This is also affirmed by the fact that definitions for "peace" and "security" were omitted in the drafting of the Charter.

⁶⁸ See, e.g. Erika de Wet *The Chapter VII Powers of the United Nations Security Council* (2004), at 235. *Studies in International Law* 3. Portland Oregon: Hart Publishing.

⁶⁹ See, e.g. Beetham (n 13) at 20.

⁷⁰ Caron (n 32) at 559.

The broad challenge to the legitimacy of the Security Council is found in its composition and decision-making procedures.⁷¹ This challenge manifests through perceptions that the Council is dominated by a few states, and that the veto held by the permanent members is unfair.⁷² These structural inequalities coupled with the general lack of procedural transparency, have threatened to destabilise the Council as a whole.⁷³ As Koskenniemi notes:⁷⁴

The dominant role of the permanent five, the secrecy of the Council's procedures, the lack of a clearly defined competence and the absence of what might be called a legal culture within the council hardly justify enthusiasm about its increased role in world affairs.

This study proposes that a component of the Council's legitimacy depends on procedural integrity.⁷⁵ For purposes of this study, procedural integrity is encapsulated as broad transparency.⁷⁶ This can be understood as fostering dialogue in the decision-making process of the Council. It follows the principle of good faith and the notion of procedural justice, to ensure that the Council remains faithful to the ethos of the UN. Procedural integrity through broad transparency serves as a feasible non-normative factor that may legitimise or delegitimise Council behaviour.⁷⁷

In sum, broad transparency encompasses two factors: procedural transparency and transparency in the deliberation process (public justification). Procedural transparency means that the working-methods of the Council and its subsidiary organs must be clear, documented and publicised. To that end, information regarding its procedures, and that of its subsidiary

⁷¹ The Council is often criticised for its lack of adherence to due process standards (*audi alterem partem*) and the level of secrecy involved in its decision-making procedures. See, e.g. UNSC Resolution 1267, S/Res/1267 (1999) on counter-terrorism related sanctions against the Taliban and Al-Qaeda, including individuals and entities affiliated with them. See also *World Summit Outcome Document* (n 51) at para. 109. This report called upon the Council "to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions".

⁷² Caron (n 32) at 562. See also, Thakur (n 23) at 11. Thakur illustrates the challenge to legitimacy surrounding the veto by posing the following question: if we had "another Holocaust or Rwanda-type genocide on one hand and a Security Council veto on the other, what would we do?"

⁷³ See Cronin & Hurd (n 46) at 212.

⁷⁴ Martti Koskenniemi "The Police in the Temple. Order, Justice and the UN: A Dialectical View" (1995) 6 *European Journal of International Law* 325, at 327.

⁷⁵ See Haas (n 59) at 193. The author contends that "moral progress" within an international organisation "must be defined in procedural terms."

⁷⁶ See Buchanan and Keohane (n 25) p. 48 ff. The term "broad transparency" is adopted from these authors, who argue that legitimacy requires some provision "for critically revising the existing terms of accountability." The authors posit that "broad transparency" (the quality of the information provided by an institution) is necessary to achieve this.

⁷⁷ See Cronin & Hurd (n 46) at 209. The authors posit that transparency, accessibility and openness are more critical to the Council's legitimacy, than the debate surrounding its membership.

committees must be accurate, obtainable at a reasonable cost and unambiguous.⁷⁸ However, procedural transparency is insufficient on its own. It must be coupled with transparency in the deliberation process (public justification). This enables accountability holders⁷⁹ to participate, albeit indirectly, in the deliberations of the Council. This is achieved through publicising substantive reasons for a decision, and not merely the decision itself. It also places a moral obligation on member states in the Council, to consistently legitimise their behaviour (and that of Council subsidiary organs) through public justifications, in at least the more contentious and consequential policies and decisions.⁸⁰ This enables the accountability holders to contribute to, rationalise or scrutinise the manner in which a decision was adopted, and incidental matters.⁸¹

The most fundamental aspect of procedural integrity for the Council, through broad transparency is public justification and reason-giving. Public justification in this sense, is the chief instrument of the Council's accountability and legitimacy.⁸²

⁷⁸ See Buchanan and Keohane (n 25) at 48.

⁷⁹ For purposes of this discussion, "accountability holders" are understood generally as the UNGA, parties to a situation under consideration, and other relevant interested parties, e.g. NGOs and relevant structures within the UN system such as the International Law Commission. In sum, there must be some substantial commitment by the Council to allow and enable scrutiny of its decisions. This can be achieved through transparency in its deliberations (public justifications).

⁸⁰ For example, it would be insufficient for the Council to merely state that it has failed to reach consensus regarding a matter, and therefore procedurally a motion has failed. There must be some form of material justification as to why they failed to reach consensus. Those states who voted for or against a motion must publicly justify the reasons behind their decisions, in at least the more controversial matters. Such practice lessens the potential for abuse of power, and it also acts as a proxy to critically revise and engage with the legitimacy of the Council.

⁸¹ See Buchanan and Keohane (n 25) at 49.

⁸² Although the Charter holds that the ICJ is "the principal judicial organ" of the UN (Art 92), it is widely accepted that the Council's powers of appreciation under Chapter VII are non-justiciable. See, e.g. Rosalyn Higgins *The Development of International Law through the Political Organs of the United Nations* (1963), at 66. Oxford: Oxford University Press. As Higgins notes, "at the San Francisco Conference the proposal to confer the point of preliminary determination [of the Council's competence] upon the International Court of Justice was rejected. The view was preferred that each organ would interpret its own competence." See also *Case Concerning 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, ICJ Reports 1992, 114 ff. The ICJ declined to review the validity of the Security Council resolution in question, but some authors contend that the Order of the Court tacitly acknowledged such a power of review. See, e.g. Thomas M. Franck "The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?" (1992) 86 *The American Journal of International Law* 519, at 523.

3.4.3 Constitutional Legitimacy

The Charter is the constituent instrument of the United Nations. Constituent instruments of international organisations are often referred to as the “constitutions” of those organisations, and the Charter is no exception. Nevertheless, the term “constitution” in the international legal order does not infer the same meaning as that in its municipal context.⁸³ In international law, it is utilised to differentiate those treaties which establish an international organisation from other international agreements.⁸⁴ The UN Charter is one such treaty which established the United Nations. As the ICJ noted in the *Conditions of Admission* case: “to ascertain whether an organ has the freedom of choice for its decisions, reference must be made to the terms of its constitution.”⁸⁵

The preceding section noted that the composition of the Council, and its privileges of tenure raise immediate concerns about its legitimacy. In order to address these concerns, some authors have suggested the need to restrictively interpret its powers under Chapter VII of the Charter.⁸⁶ Franck aptly summarises this notion, stating:⁸⁷

While the Council has the power to act on behalf of the UN as a whole and to commit its members to action under Charter article 25, it is only a distorted miniature executive council of the UN membership. A third of its members are unelected. To assert the legitimacy of its actions... the Council must be seen to be acting in accordance with established procedures and limitations.

⁸³ See *Prosecutor v Tihomir Blaskic*, Judgment on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, IT-95-14, 29 October 1997, Appeals Chamber, at para. 40. Available from: <http://www.icty.org>.

⁸⁴ See, e.g. Vienna Convention on the Law of Treaties (1969) 1155 *United Nations Treaty Series* 331 [hereinafter Vienna Convention]. Art 5 distinguishes between a treaty which constitutes an international organisation, and treaties adopted within an international organisation.

⁸⁵ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* Advisory Opinion, ICJ Reports 1948, 57 ff. at 64.

⁸⁶ See, e.g. Tladi (n 60) at 30. The author contends that this need to restrictively interpret the powers of the Council is “not for narrow legalistic reasons, but for reasons based on moral notions of legitimacy and democracy.”

⁸⁷ Franck (n 2) at 218.

In addition, there must be congruence between the Council's Charter based mandate and its behaviour in practice.⁸⁸ Therefore, in instances where a situation falls within the Council's constitutional limits, its constitutional legitimacy creates a moral obligation for the Council to act consistently with its mandate. That is, a moral obligation to make a determination in terms of Article 39, and a moral obligation to place the situation on its agenda, and to take appropriate measures to maintain or restore international peace and security.

In sum, the Security Council's discretion is limited by the Charter in terms of Article 24.⁸⁹ Its behaviour must conform to the maintenance of international peace and security,⁹⁰ and the Council must respect the essence and the ethos of the principles and purposes of the UN. Furthermore, the Council is bound by its rules of procedure,⁹¹ and its discretion is also limited by *jus cogens*, as peremptory norms of international law. These legal limitations constitute the essence of the Council's constitutional legitimacy. However, the Council's constitutional legitimacy also depends on coherency, between its constitutional limits, its constitutional mandate, and its behaviour in practice.⁹²

⁸⁸ See, e.g. High-Level Panel Report (n 32) para. 256. This report implored "the permanent members, in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses." See, e.g. Louise Arbour "The responsibility to protect as a duty of care in international law and practice" (2008) 34 *Review of International Studies* 445, at 453-454. Arbour asserts that the use of the veto to block an initiative to reduce the risk of genocide would "constitute a violation of the vetoing States' obligations under the Genocide Convention." Although Art VIII of the Genocide Convention specifically provides that UN organs must take "appropriate action" to prevent genocide, it seems plausible to apply the same principle in respect of other human rights conventions and international law in general.

⁸⁹ See generally chapter 2 of this study.

⁹⁰ See, e.g. Tladi (n 60) at 34 ff. Regardless of the seriousness of a situation and the moral arguments advanced for UN intervention, the Security Council can only be properly seized of a matter, if it constitutes a threat to international peace and security (i.e. the situation amounts to a breach of international peace or has the potential to constitute such a breach). The only alternative, though analogous with the latter, is that a situation amounts to an act of aggression in international law.

⁹¹ See Arts 27-32 of the Charter. See also *Provisional Rules of Procedure of the Security Council* (n 66).

⁹² See, e.g. Brunnée & Toope (n 18) at 25 ff. The authors develop a theory of legal legitimacy in international law that draws on Fuller's model of the "internal morality of law". As a component of their theory, the authors contend that there needs to be congruence between legal norms and official action. The authors also argue, that if this condition (amongst others) is not fulfilled, then "the process of law creation, be it through legislation, adjudication or negotiation, is fundamentally flawed". See also, *The Kosovo Report* (n 22) at 198. This report noted that "the current system allowing any permanent UNSC member to paralyze UN action through the use of the veto must be adjusted in a judicious manner to deal effectively with cases of extreme humanitarian crisis."

3.5 Concluding remarks

Legitimacy is a multifaceted concept which encompasses legal, moral and sociological criteria. Normative and descriptive conceptions of legitimacy are seemingly co-dependent, in the sense that the Council must not only be legitimate *sensu stricto*. It must also be perceived as legitimate. As such, legitimacy for the Security Council extends beyond a textual or legalistic interpretation of the Charter, and incorporates teleological factors which morally justify the Council's authority. This chapter advanced a model of legitimacy for the Council based on three criteria: instrumental legitimacy, procedural legitimacy, and constitutional legitimacy. These three criteria as discussed, constitute a minimal threshold for the Council to legitimately exercise its discretion under Chapter VII of the Charter.

In sum, the instrumental component of legitimacy depends on a value-based standard concerning the Council's purpose and its performance. It follows the common interests of UN member states, and these are encapsulated as human rights. The procedural component of legitimacy is based on procedural integrity, understood chiefly as broad transparency. This means that the working methods of the Council and its subsidiary organs must be transparent, accessible and unambiguous. However, procedural transparency is insufficient in itself. It must be coupled with transparency in the deliberation process (public justification). As Council decisions are *de facto* non-justiciable, public justifications serve as the chief instrument of the Council's legitimacy. The constitutional component of legitimacy follows the Charter based limitations to the Council's authority, as discerned in chapter two of this study. However, the Council's constitutional legitimacy also depends on congruence between its Charter based mandate, its constitutional limits and its behaviour in practice. In this sense, the Council's wide margin of discretion under Chapter VII, is within limits, albeit moral, under the sphere of legitimacy.

Chapter 4

Conclusion

This study has advanced the argument that there are both legal and non-legal responsibilities that limit the Security Council's margin of discretion under Chapter VII of the Charter, and that this assertion is fundamental to the stability of the Charter regime. The situation is pertinent because the structural and procedural deficiencies in the Council have often resulted in its dysfunction, and this has led to the regression of the international legal order. What is international law, if it does not bind all to whom it applies?

While the Council ultimately determines its own competence, it must be remembered that it exists for a purpose. The Council exists to protect the shared values and norms entrenched in international law and the Charter, as distinct from abstract political interests. Therefore, it is plausible to accept the notion that its value depends on its ability to meet those ends. If the Council fails to consistently and impartially address its purpose without proper justification, it loses its relevance and ultimately its legitimacy. The argument is not that the Council must achieve its goal outright in each situation. It is that the common aspirations of the United Nations constitute the fundamental yardstick for the Council's discretion, and that its actions must primarily be guided by these considerations. It is inadequate for the Council to claim "unique legitimacy" in area of international peace and security, yet act in a capricious manner.

It is equally important to remember that the Security Council acts on behalf of UN member states, and there are obligations which flow from that relationship. In this sense, there is an element of reciprocity that must be addressed, because of the imbalance of power between the Council's permanent members, its non-permanent members and other UN member states. If there is no mutual sense of obligation, and no real opportunity to participate in the deliberations of the Council, then are all the member states of the United Nations *actually* parties to the Charter, or do some merely act in the form of such?

This study has advanced a framework of legitimacy for the Security Council to legitimately exercise its discretion under Chapter VII of the Charter. This framework of legitimacy is not absolute, but should be understood as a feasible model of legitimacy, which accounts for the most important goals of the United Nations, and which rationalises the sense of obligation that follows the Security Council's authority.

The study acknowledges the fact that there are other facets of the Council's legitimacy that have not been addressed, such as issues concerning Council reform. However, the study advances the opportunity to assess the legitimacy of Council within a particular context, and aims to contribute to the value-based approach to international law, through the sphere of legitimacy.

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