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## The Security Council As “Global Legislator”: Ultra Vires or Ultra Innovative?

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# The Security Council As “Global Legislator”: Ultra Vires or Ultra Innovative?

Eric Rosand

## Abstract

This Article begins by taking a closer look at the two Security Council resolutions at the center of this debate: Resolution 1373 and Resolution 1540. It argues that they make pragmatic sense as necessary responses by the Security Council to address urgent, global threats. Further, it explains how they serve to fill the existing gaps in international law, which, if not addressed, would hinder the international community’s ability to tackle these twenty-first century threats. Part II, after providing a brief summary of the Council’s powers under the U.N. Charter, focuses on whether this activity falls within the Security Council’s mandate. In doing so, Part II describes the breadth of the Council’s powers under Chapter VII, which are subject to few express limitations. Many commentators cite the limitation that the Council may only address a particular situation, with a time-limited, case-based reaction, to support their conclusion that while the Council may have the authority to legislate in response to a specific situation, it lacks the authority to do so on a global basis. Part II concludes, however, that this limitation, which does not actually appear in the text of the Charter itself, is in fact not sufficient to circumscribe the Council’s activity in this area. To continue to read such a limitation into the Charter at a time when the most urgent threats to international peace and security are neither time nor geographically limited would prevent the Council from being able to fulfill its responsibility under the Charter to maintain international peace and security through “prompt and effective action.” Part III of this Article looks at previous Council actions that have imposed binding obligations on all States, albeit not in response to a global (vice specific) threat. It explains that the adoption of Resolutions 1373 and 1540 constitutes a qualitatively different exercise of the Council’s Chapter VII power, which is manifested in a number of ways. Part III concludes, however, that this difference serves to highlight the innovative nature of the Council’s activity rather than make it ultra vires. Despite the unique nature of Resolutions 1373 and 1540, the discretion given to the Council under the Charter, both in terms of determining the existence of threats to the peace and the appropriate enforcement measures to address such threats, appears broad enough to allow for this innovative activity. Part IV addresses the impact that this Security Council activity, which essentially excludes the 176 U.N. Members that are not on the Council from the decision-making process, will have on the traditional consent-based international law-making process. It highlights some of the limitations of this process, which become more pronounced when the United Nations is confronted with the pressing need to fill a legal gap. Part IV concludes that in these circumstances the innovative use of Council powers, while circumventing the cumbersome multilateral treaty-making approach, is nevertheless justified. Recognizing that the U.N. Charter has evolved to allow the Council to act as a “global legislator” under certain circumstances, Part V argues that there are some safeguards the Council should implement each time it uses this authority. Such safeguards are needed to maintain the Council’s institutional

“legitimacy,” ensuring that the Council exercise this broad power in ways that most States deem appropriate and within its competence. This will induce the broad cooperation from States that is needed to assure the most effective use of this authority. As this Article concludes, the Council needs the ability to use this tool to address, within the State-centered U.N. Charter system in which it operates, the threats posed by non-State terrorists and terrorist groups.

## ARTICLES

# THE SECURITY COUNCIL AS “GLOBAL LEGISLATOR”: *ULTRA VIRES* OR *ULTRA INNOVATIVE*?

*Eric Rosand\**

### INTRODUCTION

The U.S. decision to go to war in Iraq in March 2003 without a resolution comparable to the one that launched the first Gulf War, and the continuing dispute as to whether this action was or was not “illegal” under the U.N. Charter, has been at the center of the debate concerning the role of the United Nations in the twenty-first century.<sup>1</sup> This dispute, however, has overshadowed the discussion surrounding a developing Security Council practice with perhaps even greater implications for both the United Nations and its Member States: namely, the Security Council’s adoption of resolutions that impose far-reaching, binding obligations on all 191 U.N. Member States. The Security Council has taken this action, which has been described as “global legislating” — as distinguished from taking decisions, which impose binding obligations that relate to a particular dispute or situation — as part of its effort to address the global terrorist threat.<sup>2</sup> Specifically, the Security Council has adopted

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1. See S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., U.N. Doc. S/678 (1990). Some have concluded that the United States and its allies had the necessary Security Council approval for the March 2003 invasion of Iraq. See, e.g., Nicholas Rostow, *Determining the Lawfulness of the 2003 Campaign Against Iraq*, 2004 ISRAELI Y.B. HUM. RTS 16, 34 (2004) (asserting that “the Security Council actions on Iraq, including the 1990 authorization to use force and the repeated findings of Iraq’s failure to carry out its cease fire obligations . . . created a compelling legal foundation for the 2003 campaign” against Iraq); William H. Taft, IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT’L L. 557 (2003) (arguing that the legality of the use of force against Iraq in March 2003 derives from earlier U.N. Security Council resolutions).

2. See Jose Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 874, 875 n.9 (2003) [hereinafter Alvarez, *Hegemonic*]; see also Roberto Lavalle, *A Novel, If Awkward, Exercise In International Law-Making: Security Council Resolution 1540*, 51 NETH. INT’L L. REV. 411 (2004); Matthew Hoppold, *Security Council Resolution 1373 and the Con-*

two resolutions imposing obligations on all States to take a series of steps to combat terrorism and prevent weapons of mass destruction ("WMD") from getting into the hands of terrorists.<sup>3</sup> Adoption of these resolutions has been described as a "fast-track" procedure under Chapter VII of the U.N. Charter for addressing global threats to international peace and security.<sup>4</sup>

This action has been applauded in some circles as an important exercise of the Council's powers, an extraordinary response to an extraordinary threat and a positive contribution to the U.N. fight against terrorism. The Council's use of this tool, however, has been also questioned and criticized by some commentators and governments as falling outside the Security Council's mandate.<sup>5</sup> The Council, they argue, was not intended to act as a

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*stitution of the United Nations*, 16 LEIDEN J. INT'L L. 593 (2003); Gilbert Guillaume, *Terrorism and International Law*, 53 INT'L & COMP. L.Q. 537, 540-43 (2004) (providing the text of the Grotius Lecture given at the British Institute of International and Comparative Law); Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901 (2002).

3. See S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/1373 (2001); see also S.C. Res. 1540, U.N. SCOR, 59th Sess., 4956th mtg., U.N. Doc. S/1540 (2004).

4. See United Nations & Global Security, International Conference, The United Nations and New Threats: Rethinking Security 13 (May 27-29, 2004), available at [http://www.un-globalsecurity.org/pdf/reports/Rome\\_conference\\_rep.pdf](http://www.un-globalsecurity.org/pdf/reports/Rome_conference_rep.pdf) (last visited Feb. 27, 2005) [hereinafter Rome U.N. Conference Report].

5. See, e.g., Happold, *supra* note 2, at 593 (asserting that in enacting Security Council Resolution 1373, the Council acted *ultra vires*); see also Statement by Permanent Representative of Egypt, to the United Nations, U.N. SCOR, 59th Sess., 4950th mtg. at 2, U.N. Doc. S/PV.4950 (Resumption 1) (2004); Statement by Vijay Nambiar, Representative of India, to the United Nations, U.N. SCOR, 59th Sess., 4950th mtg. at 23, U.N. Doc. S/PV.4950 (2004) (expressing "concern about the increasing tendency of the Security Council in recent years to assume new and wider powers of legislating on behalf of the international community, with its resolutions binding on all States"); Statement by Rezlan Ishar Jenie, Permanent Representative of Indonesia, to the United Nations, U.N. SCOR, 59th Sess., 4950th mtg. at 31, U.N. Doc. S/PV.4950 (2004); Statement by Permanent Representative of Iran, to the United Nations, U.N. SCOR, 59th Sess., 4950th mtg. at 32, U.N. Doc. S/PV.4950 (2004); Statement by Permanent Representative of Namibia, to the United Nations, U.N. SCOR, 59th Sess., 4950th mtg. at 16, U.N. Doc. S/PV.4950 (Resumption 1) (2004); Statement by Permanent Representative of Nepal, to the United Nations, U.N. SCOR, 59th Sess., 4950th mtg. at 13, U.N. Doc. S/PV.4950 (Resumption 1) (2004); Statement by Ndekhedehe Effiong Ndekjedehe, Permanent Representative of Nigeria, to the United Nations, U.N. SCOR, 59th Sess., 4950th mtg. at 14, U.N. Doc. S/PV.4950 (Resumption 1) (2004); Statement by Kishore Mahbubani, Representative of Singapore, to the United Nations, U.N. SCOR, 59th Sess., 4950th mtg. at 25, U.N. Doc. S/PV.4950 (2004) (questioning whether the Security Council can assume the role of treaty-making or legislate rules for Member States); Statement by Permanent Representative of South Africa, to the United Nations, U.N. SCOR, 59th Sess., 4950th mtg. at 22, U.N. Doc. S/PV.4950 (2004); Statement by Perma-

"global legislator."<sup>6</sup> They fear that such action could disrupt the balance of power between the Council and the General Assembly as set forth in the Charter.<sup>7</sup> Moreover, they assert that having the Security Council, a fifteen-Member body not accountable to other U.N. organs, impose obligations on all 191 members threatens to weaken one of the cornerstones of the traditional international law structure, namely, the principle that international law is based on the consent of States.<sup>8</sup>

This Article begins by taking a closer look at the two Security Council resolutions at the center of this debate: Resolution 1373<sup>9</sup> and Resolution 1540.<sup>10</sup> I will argue that they make pragmatic sense as necessary responses by the Security Council to address urgent, global threats. Further, I will explain how they serve to fill the existing gaps in international law, which, if not addressed, would hinder the international community's ability to tackle these twenty-first century threats. Part II, after providing a brief summary of the Council's powers under the U.N. Charter, will focus on whether this activity falls within the Security Council's mandate. In doing so, Part II will describe the breadth of the Council's powers under Chapter VII, which are subject to

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nent Representative of Switzerland, to the United Nations, U.N. SCOR, 59th Sess., 4950th mtg. at 28, U.N. Doc. S/PV.4950 (2004).

6. See, e.g., Statement by Mourad Benmehidi, Deputy Representative of Algeria, to the United Nations, U.N. SCOR, 59th Sess., 5059th mtg. at 17, U.N. Doc. S/PV.5059 (2004) (commenting on the adoption of Security Council Resolution 1566, which includes a paragraph which some have argued is an attempt by the Security Council to offer a definition of terrorism, thereby encroaching upon the prerogatives of the General Assembly); Laval, *supra* note 2, at 418 (arguing that the General Assembly, "by reason of the universality of its composition, is better suited than the Council to legislate for the international community").

7. See, e.g., Happold, *supra* note 2, at 607; Statement by H.E. Ambassador Christian Wenaweser, Permanent Representative of the Principality of Liechtenstein, to the United Nations, at 3 (Oct. 11, 2004), available at <http://www.un.int/liechtenstein/10-10-2004%20Statement%20SC%20Reform.pdf> (last visited Feb. 27, 2005) (stating that with the adoption of Resolution 1373, the Security Council has expanded its activities into the field of law-making, a sphere that is reserved to the General Assembly under the Charter, adding that this "raises fundamental questions which affect the institutional balance of the Organization"); Statement by Vijay Nambiar, Representative of India, *supra* note 5, at 23; Statement by Rezlan Ishar Jenie, Permanent Representative of Indonesia, *supra* note 5, at 31 (noting that "any far-reaching assumption of authority by the Security Council to enact global legislation is not consistent with the provisions of the United Nations Charter").

8. See, e.g., Rome U.N. Conference Report, *supra* note 4, at 14.

9. See S.C. Res. 1373, *supra* note 3.

10. See S.C. Res. 1540, *supra* note 3.

few express limitations. Many commentators cite the limitation that the Council may only address a particular situation, with a time-limited, case-based reaction, to support their conclusion that while the Council may have the authority to legislate in response to a specific situation, it lacks the authority to do so on a global basis.<sup>11</sup> Part II will conclude, however, that this limitation, which does not actually appear in the text of the Charter itself, is in fact not sufficient to circumscribe the Council's activity in this area. To continue to read such a limitation into the Charter at a time when the most urgent threats to international peace and security are neither time nor geographically limited would prevent the Council from being able to fulfill its responsibility under the Charter to maintain international peace and security through "prompt and effective action."<sup>12</sup>

Part III of this Article will look at previous Council actions that have imposed binding obligations on all States, albeit not in response to a global (vice specific) threat. It will explain that the adoption of Resolutions 1373<sup>13</sup> and 1540<sup>14</sup> constitutes a qualitatively different exercise of the Council's Chapter VII power, which is manifested in a number of ways. Part III will conclude, however, that this difference serves to highlight the innovative nature of the Council's activity rather than make it *ultra vires*. Despite the unique nature of Resolutions 1373 and 1540, the discretion given to the Council under the Charter, both in terms of determining the existence of threats to the peace and the appropriate enforcement measures to address such threats, appears broad enough to allow for this innovative activity.

Part IV will address the impact that this Security Council activity, which essentially excludes the 176 U.N. Members that are not on the Council from the decision-making process, will have

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11. The widely accepted definition of "legislation" in the context of the United Nations has three characteristics: the resolution must be unilateral in form, create or modify some element of a legal norm, and the legal norm in question must be general in nature, that is directed to indeterminate addresses and capable of repeated application over time. See EDWARD YEMIN, *LEGISLATIVE POWERS IN THE UNITED NATIONS AND ITS SPECIALIZED AGENCIES* 6 (1969); see also Happold, *supra* note 2, at 597; Jose Alvarez, *The Security Council's War on Terrorism: Problems and Policy Options*, in *REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES* 119, 120-21 (Erika de Wet & André Nollkaemper eds., 2003) [hereinafter Alvarez, *War on Terrorism*]; Fredric Kirgis, *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 520 (1995).

12. U.N. CHARTER art. 24, ¶ 1.

13. See S.C. Res. 1373, *supra* note 3.

14. See S.C. Res. 1540, *supra* note 3.

on the traditional consent-based international law-making process. It will highlight some of the limitations of this process, which become more pronounced when the United Nations is confronted with the pressing need to fill a legal gap. Part IV will conclude that in these circumstances the innovative use of Council powers, while circumventing the cumbersome multilateral treaty-making approach, is nevertheless justified.

Recognizing that the U.N. Charter has evolved to allow the Council to act as a "global legislator" under certain circumstances, Part V will argue that there are some safeguards the Council should implement each time it uses this authority. Such safeguards are needed to maintain the Council's institutional "legitimacy," ensuring that the Council exercise this broad power in ways that most States deem appropriate and within its competence. This will induce the broad cooperation from States that is needed to assure the most effective use of this authority. As this Article concludes, the Council needs the ability to use this tool to address, within the State-centered U.N. Charter system in which it operates, the threats posed by non-State terrorists and terrorist groups.

### I. SECURITY COUNCIL RESOLUTIONS 1373 AND 1540: A TRIUMPH OF PRAGMATISM

Following the events of September 11, 2001, the Council, like a number of governments and other international bodies, took unprecedented steps to increase its contribution to the fight against terrorism. Perhaps its most important action was the adoption of Resolution 1373<sup>15</sup> on September 28, 2001. The Council had previously adopted resolutions condemning terrorism generally or addressing specific terrorist acts, often in the context of State-sponsored terrorism.<sup>16</sup> In the aftermath of September 11, 2001, however, the Council sought to address the global terrorist threat posed, not by States, but by non-State terrorists and terrorist groups. The Council imposed a series of ob-

15. See S.C. Res. 1373, *supra* note 3.

16. See, e.g., S.C. Res. 1214, U.N. SCOR, 52d Sess., 3952d mtg. at 1, U.N. Doc. S/PV.1214 (1998) (condemning certain acts of the Taliban in Afghanistan); S.C. Res. 1189, U.N. SCOR, 52d Sess., 3915th mtg. at 1, U.N. Doc. S/PV.1189 (1998) (condemning the terrorist bombings in Kenya and Tanzania); S.C. Res. 731, U.N. SCOR, 47th Sess., 3033d mtg. at 51, U.N. Doc. S/731 (1992) (condemning the destruction of Pan Am flight 103 and UTA flight 772 "and the resultant loss of lives").



ligations on all States, requiring them to take various measures to enhance their capacity to combat terrorism.<sup>17</sup> It required all States, *inter alia*, to criminalize terrorist financing activity, freeze terrorist funds, refrain from providing "active or passive" support to terrorists, and deny safe haven to terrorists and their supporters.<sup>18</sup>

Some two and a half years later, the Council again sought to tackle a global threat in a comprehensive way, this time the threat posed by the proliferation of WMD and their means of delivery, in particular, the threat that terrorists and other non-State actors might acquire such weapons.<sup>19</sup> Again, faced with a global threat potentially emanating from both non-State actors as well as any State, the Council decided to adopt a resolution that imposed a series of far-reaching obligations on all States. It required them to refrain from providing support to non-State actors attempting to manufacture, possess, transport, or use WMD and their means of delivery.<sup>20</sup> It further required them to prohibit in domestic law any such activities by non-State actors, particularly for terrorist purposes, and prohibit assistance or financing of such activities.<sup>21</sup> It obligated States to adopt measures to prevent the proliferation of WMD and their means of delivery, including by accounting for and physically protecting such items, establishing effective border controls and law enforcement measures.<sup>22</sup>

The two resolutions share a number of elements. In each instance, the Council is responding, not to a specific situation or threat but to one of a global nature.<sup>23</sup> Additionally, as noted, both use the Council's authority under Chapter VII of the U.N. Charter to impose far-reaching binding obligations on all States.<sup>24</sup> Whether this constituted an appropriate use of this authority will be discussed below. In doing so, both resolutions seek to establish global norms, while leaving considerable discre-

17. See S.C. Res. 1373, *supra* note 3.

18. See *id.* ¶¶ 1-3.

19. See S.C. Res. 1540, *supra* note 3, ¶ 1.

20. See *id.*

21. See S.C. Res. 1540, *supra* note 3, ¶ 2.

22. See *id.*

23. See S.C. Res. 1373, *supra* note 3; see also S.C. Res. 1540, *supra* note 3.

24. See Jane E. Stromseth, *An Imperial Security Council? Implementing Security Council Resolutions 1373 and 1390*, 97 AM. SOC'Y INT'L L. PROC. 41, 42 (2003) [hereinafter Stromseth, *Imperial Security Council*].

tion to each State to decide how best to implement those norms consistent with its domestic system. Moreover, both are seeking to fill a recognized gap in existing international law regimes relating to counter-terrorism and counter-proliferation, thus deviating from the traditional method of creating multilateral obligations, namely, the intergovernmental treaty-making process.<sup>25</sup> In addition, each resolution established a committee of the Security Council, consisting of all fifteen Council members, to monitor States' implementation of the relevant resolution, and requested States to report to the committee on their implementation efforts.<sup>26</sup> The effectiveness of each resolution will depend, in large part, on whether these committees will be able to secure cooperation from States.<sup>27</sup>

From a purely pragmatic perspective, this Council behavior should be welcomed. The Council's objective in adopting Resolution 1373 was to convince all U.N. Member States to do more to combat terrorism.<sup>28</sup> The global nature of the terrorist problem is difficult to dispute. Given the proven mobility of terrorists, the permeable nature of borders, the different and evolving sources of terrorist financing, and the ability of terrorists to identify and exploit those countries with weak counter-terrorist infrastructure, it is also hard to question the logic behind the Council's decision to require all States to take action to combat terrorism. Partly as a result of Resolution 1373, and the work of its offspring, the Counter-Terrorism Committee ("CTC"),<sup>29</sup> almost every country has taken steps to enhance its counter-terrorism machinery, whether in the form of adopting anti-terrorism

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25. See Lavalley, *supra* note 2, at 418; see also Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1515 (2004); Jöst Delbrück, *Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State*, 11 IND. J. GLOBAL LEGAL STUD. 31, 36 (2004); Alvarez, *Hegemonic*, *supra* note 2, at 875; Happold, *supra* note 2, at 594; Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333, 334 (2003) [hereinafter Rosand, *Security Council Resolution 1373*]; Nicholas Rostow, *Before and After: The Changed U.N. Response to Terrorism Since September 11th*, 35 CORNELL INT'L L.J. 475, 482 (2002); Szasz, *supra* note 2, at 902.

26. See S.C. Res. 1373, *supra* note 3, ¶ 6; see also S.C. Res. 1540, *supra* note 3, ¶ 4.

27. See generally GABRIEL H. OOSTHUIZEN & ELIZABETH WILMSHURST, *TERRORISM AND WEAPONS OF MASS DESTRUCTION: SECURITY COUNCIL RESOLUTION 1540 (2004)*, available at <http://www.riia.org/pdf/research/il/BP0904.pdf> (last visited Feb. 27, 2005).

28. See S.C. Res. 1373, *supra* note 3.

29. See Counter-Terrorism Committee Established Pursuant to Resolution 1373, available at <http://www.un.org/Docs/sc/committees/1373/about.html> (last visited Mar. 15, 2005).

legislation, strengthening border controls, becoming party to international treaties related to terrorism, or becoming proactive in denying safe haven to terrorists and their supporters.<sup>30</sup>

Furthermore, the adoption of Resolution 1373 makes even more pragmatic sense in light of the U.N. efforts, or lack thereof, outside of the Security Council to combat terrorism.<sup>31</sup> This is best exemplified by the work in General Assembly, where disputes over the definition of terrorism have left negotiations on a draft comprehensive convention against international terrorism at a standstill for the past thirty-two years.<sup>32</sup> In addition, when the Council adopted Resolution 1373, only two States were party to all twelve of the existing international conventions and protocols related to terrorism that were negotiated and concluded in the General Assembly and other U.N. bodies.<sup>33</sup> In

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30. See DAVID CORTRIGHT ET AL., AN ACTION AGENDA FOR ENHANCING THE UNITED NATIONS PROGRAM ON COUNTER-TERRORISM 12 (Fourth Freedom Forum, Sept. 2004) available at [http://www.fourthfreedom.org/pdf/Action\\_Agenda.pdf](http://www.fourthfreedom.org/pdf/Action_Agenda.pdf) [hereinafter FOURTH FREEDOM FORUM REPORT]; see also Eric Rosand, *Security Council Resolution 1373 and the Counter-Terrorism Committee: The Cornerstone of the United Nations Contribution to the Fight Against Terrorism*, in LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM 603, 615-17 (2004) [hereinafter Rosand, *Cornerstone of the United Nations*]; Rostow, *supra* note 25, at 484-85.

31. See Anne-Marie Slaughter & William Burke-White, *Focus: September 11, 2001 — Legal Response to Terror: An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 11 (2002) (stating that as of September 11, 2001, "much of the international law governing terrorism has been patchy and often ineffective. The specific conventions only ban one technique and have not been uniformly respected. The broader [U.N. General Assembly] declarations have no binding legal force.").

32. For summaries of the negotiations held in 2004 on the conventions, see *Measures to Eliminate International Terrorism, Report of the Working Group*, U.N. GAOR, 59th Sess., U.N. Doc. A/C.6/59/L.10 (Oct. 8, 2004); see also *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996*, U.N. GAOR, 8th Sess., U.N. Doc. A/59/37 (2004); Rostow, *supra* note 1, at 480; Slaughter & Burke-White, *supra* note 31, at 10.

33. On September 28, 2001, only Botswana and the United Kingdom were parties to all twelve international treaties related to terrorism. These treaties are the 1999 International Convention for the Suppression of the Financing of Terrorism, the 1997 International Convention for the Suppression of Terrorist Bombings, the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection, the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, the 1988 Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, the 1980 Convention on the Physical Protection of Nuclear Material, the 1979 International Convention against the Taking of Hostages, the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, and the 1963

fact, the Terrorist Financing Convention, the most recent of these treaties, did not yet have enough parties to have entered into force.<sup>34</sup> Moreover, none of the existing instruments contains a mechanism to monitor State parties' efforts to implement them. Thus, the need for the Council to step in — to establish a set of global counter-terrorism norms and to create a committee to work with States to help them implement such norms — was apparent. This is particularly so if the United Nations, and in particular the Security Council, is serious about tackling the global terrorist threat to international peace and security.

The Council's adoption of Resolution 1540 should also be welcomed as a pragmatic use of its authority to address another critical, global threat. Only a few months prior to the adoption of Resolution 1540, the 191 Member General Assembly called upon States to support international efforts to prevent terrorists from acquiring weapons of mass destruction and their means of delivery and urged States to strengthen their domestic infra-

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Convention on Offences and Certain Other Acts Committed on Board Aircraft. See International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. GAOR, 54th Sess., 76th mtg., U.N. Doc. A/54/109 (2000), *reprinted in* 39 I.L.M. 270 (2000) [hereinafter Terrorist Financing Convention]; International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, U.N. GAOR, 52d Sess., U.N. Doc. A/RES/52/164 (1997); Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, U.S. Treaty No. 103-8, U.N. Doc. S/22393, *reprinted in* 30 I.L.M. 721; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474; Convention on the Physical Protection of Nuclear Material, adopted Oct. 26, 1979, T.I.A.S. No. 11,080, 1456 U.N.T.S. 1987; International Convention against the Taking of Hostages, adopted Dec. 12, 1979, 1316 U.N.T.S. 206; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 168; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 178; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 106; Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (entered into force Dec. 4, 1969). All twelve conventions are available at <http://untreaty.un.org/English/Terrorism/Conv12.pdf> (last visited Mar. 24, 2005).

34. As of September 28, 2001, only five countries were parties to the Convention, 17 fewer than the required 22. See Terrorist Financing Convention, *supra* note 33, at 271. Pursuant to Article 26 of the Convention, the Convention "shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations." *Id.*

structure to this end.<sup>35</sup> Resolution 1540 could be viewed partly as the Council's attempt to stimulate these international efforts.

It is also generally recognized that there is a gap in the existing non-proliferation regimes. The relevant instruments — the Chemical Weapons Convention,<sup>36</sup> the Non-Proliferation Treaty,<sup>37</sup> and the Biological Weapons Convention<sup>38</sup> — are generally viewed as not dealing with this potential of non-State actors acquiring WMD in the necessary detail.<sup>39</sup> Thus, as it did in adopting Resolution 1373, the Council acted to fill this gap so as to address this pressing threat. It adopted a resolution under Chapter VII that imposes a series of obligations on all States and creates a monitoring committee to work with them to help ensure that they implement them. It would take many years to negotiate a multilateral treaty in this area and convince all States to become parties to it; given the urgent nature of the threat, that inevitable delay makes Resolution 1540 a welcome practical response to a pressing problem.

Despite their contributions to the U.N. efforts to address the preeminent threats of the new century, these Council resolutions have nevertheless been the subject of much criticism and debate, which center on the role of the Security Council under the U.N. Charter system in addressing such threats in the twenty-first century.

## II. *CONSISTENT WITH THE U.N. CHARTER?*

From the above discussion, it appears that a strong case can be made the Security Council's adoption of Resolution 1373 and Resolution 1540 were sensible responses to serious, critical

35. See G.A. Res. 58/48, U.N. GAOR, 58th Sess., 71st mtg. at 14, U.N. Doc. A/58/PV.17 (2003).

36. See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, G.A. Res. 47/39, U.N. GAOR, 47th Sess., 74th mtg., U.N. Doc. A/RES/47/39, *reprinted in* 32 I.L.M. 800 (1993) [hereinafter Chemical Weapons Convention].

37. See Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970).

38. See Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 26 U.S.T. 571, 1015 U.N.T.S. 163 (1972) [hereinafter Biological Weapons Convention].

39. See U.N. SCOR, 59th Sess., 4950th mtg. at 2, U.N. Doc. S/PV.4950 (2004) (providing statements by Representatives of nearly all 15 Members of the Security Council and some 20 non-Council Members at a Security Council public meeting to discuss a draft of what became Security Council Resolution 1540).

threats. Whether they were consistent with the U.N. Charter and within the Security Council's mandate, is, however, another question. The question is pressing in light of the criticism that the Council, in assuming this "global legislating" function — which critics claim was not assigned under the Charter — has in fact acted contrary to the Charter.<sup>40</sup> Whether or not this is viewed as a legitimate innovation or an *ultra vires* exercise of the Council's powers could have an impact on States' willingness to implement the obligations imposed by these resolutions.

The debate over whether the Council has the power to act as a "global legislator" is the most recent in a long line of debates over the scope of the Council's powers under Chapter VII of the U.N. Charter, which authorizes it to adopt measures necessary to maintain international peace and security.<sup>41</sup> Since the end of the Cold War, the question of whether there are any political and legal limits on the exercise of the Council's Chapter VII authority has received much attention. Part II will seek to answer this question by trying to place this Council activity within the Charter framework to determine whether the criticisms of the Resolution 1373 and 1540 are valid.

Article 24, Paragraph 1 of the Charter endows the Security Council with the primary responsibility for the maintenance of international peace and security so as to ensure prompt and effective action by the United Nations.<sup>42</sup> U.N. Members have agreed that, in carrying out these duties, the Council acts on its behalf.<sup>43</sup> Moreover, it is generally agreed that each U.N. organ is the judge of its own competence.<sup>44</sup> The International Court of Justice, the Charter's judicial organ, is also given a role here, the

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40. See, e.g., Alvarez, *Hegemonic*, *supra* note 2, 875 n.9; Happold, *supra* note 2, at 593; Guillaume, *supra* note 2, at 540-43; Szasz, *supra* note 2, at 901.

41. U.N. CHARTER ch. VII.

42. U.N. CHARTER art. 24, ¶ 1.

43. See *id.*

44. See Susan Lamb, *Legal Limits to United Nations Security Council Powers*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 361, 363 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999); see also Louis Sohn, *The U.N. System as Authoritative Interpreter of Its Law*, in *UNITED NATIONS LEGAL ORDER* 203 (Oscar Schachter & Christopher C. Joyner eds., 1996). But see J.A. Frowein & N. Kirsch, *Introduction*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 701, 710 (Bruno Simma et al. eds., 2d ed. 2002) [hereinafter Frowein & Kirsch, *Introduction*] (arguing that while every U.N. organ must, in the first place, determine its own jurisdiction, "such a determination is binding only if supported by the Member States in general").

scope of which remains the subject of much debate,<sup>45</sup> although it is generally agreed that the court lacks the power to find a Council resolution to be "null and void."<sup>46</sup>

To enable the Council to fulfill this responsibility effectively and efficiently, the Charter endows it — under Chapter VII — with the power to take far-reaching decisions, which are binding on U.N. Member States. All U.N. Members have not only undertaken to carry out the decisions of the Council (Article 25),<sup>47</sup> but

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45. Over the last 40 years, the International Court of Justice ("ICJ") has hinted that it may have judicial review power over Council resolutions. For example, in the *Certain Expenses* case, the Court appeared to reject the idea of judicial review, asserting that there was no "procedure" in the "structure of the United Nations" for determining the validity of acts of other organs, and concluding therefore that such organs must, *ab initio*, "determine [their] own jurisdiction." Advisory Opinion, *Certain Expenses of the United Nations*, [1962] I.C.J. 151, 155. In 1971, the Court said that "[u]ndoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned," but nevertheless proceeded to consider such "objections" in its reasoning. See Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa)* Notwithstanding Security Council Resolution 276, [1971] I.C.J. 16, 45. Some twenty years later, in the case surrounding the bombing of Pan Am flight 103, the majority of the court declined to exercise a power of judicial review over a Security Council resolution, but suggested that such a power may exist. Moreover, a number of judges argued in concurring and dissenting opinions that the ICJ should review the validity of the Council resolution. See Provisional Measures Order of April 14, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.)*, [1992] I.C.J. 114, 140; see also, *id.*, [1992] I.C.J. 114, 156 (concurring opinion of Shahabuddin, J.); *id.* [1992] I.C.J. 114, 174-75 (dissenting opinion of Bedjaoui, J.); *id.*, [1992] I.C.J. 114, 192-93; *id.*, [1992] I.C.J. 114, 196 (dissenting opinions of Weeramantry, J.). For further discussion of the power of the ICJ vis à vis the Security Council, see THOMAS FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 5 (2002) [hereinafter FRANCK, *RECOURSE TO FORCE*]; Marcella David, *Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court*, 40 HARV. INT'L L. J. 81, 144 (1999) (addressing the possibility of having an international court review the legality of Security Council resolutions); Faiza Patel King, *Sensible Scrutiny: The Yugoslavia Tribunal's Development of Limits on the Security Council's Powers Under Chapter VII of the Charter*, 10 EMORY INT'L L. REV. 509, 524 (1996); Kirgis, *supra* note 11, at 519; T.D. Gill, *Legal and Some Political Limitations on the Power of the United Nations Security Council to Exercise its Enforcement Powers Under Chapter VII of the Charter*, 26 NETH. Y.B. INT'L L. 33, 37 (1995).

46. See Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 3 (1996); see also W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 93 (1993) (noting that it would not be easy for the Court to find judicially manageable standards to review the Security Council's exercise of its authority under Chapter VII). But *c.f.*, Babbach Sabahi, *The ICJ's Authority to Invalidate the Security Council's Decisions Under Chapter VII: Legal Romanticism or the Rule of Law?*, 17 N.Y. INT'L L. REV. 1, 1 (2004) (arguing that the ICJ possesses the authority to invalidate the Council's resolutions under Chapter VII, but has so far abstained from exercising it).

47. U.N. CHARTER art. 25.

they have also agreed to carry out such decisions that are for the maintenance of peace and security (Article 48, Paragraph 1).<sup>48</sup> Before the Council can utilize its powers under Chapter VII, however, it must determine, pursuant to Article 39, that there is a situation involving a threat to international peace and security,<sup>49</sup> and the measures the Council takes under Chapter VII must be aimed at removing the threat by ending that situation.<sup>50</sup> The Council has broad discretionary power in making this determination.<sup>51</sup> While the "threat to the peace" concept in Article 39 was drafted to refer to threats created by inter-State conflicts, the Council quickly broadened this narrow interpretation and now applies it to intra-State conflicts.<sup>52</sup> Council practice over the past fifteen years, where it has exercised its Chapter VII authority in internal national conflicts — such as those of Albania, Angola, Burundi, the Central African Republic, the Democratic Republic of the Congo, East Timor, Liberia, Rwanda, Sierra Leone, Somalia, and Sudan — indicates wide acceptance that the concept of "threat to the peace" now encompasses both inter and

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48. U.N. CHARTER art. 48, ¶ 1.

49. See U.N. CHARTER art. 39. Pursuant to Article 39 of the Charter, the Council may also act under Chapter VII if it determines the existence of a breach of the peace or an act of aggression. This Article, however, will only address Council action in response to a "threat" to the peace; in adopting both of the resolutions that are the focus of this Article, the Council was responding to a "threat." See S.C. Res. 1540, *supra* note 3, at 1 (stating in the opening sentence that the Security Council affirmed "that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security"); see also S.C. Res. 1373, *supra* note 3, at 1 (asserting in the third paragraph that "any act of international terrorism . . . constitute[s] a threat to international peace and security").

50. See Happold, *supra* note 2, at 603.

51. See ERIKA DE WET, *THE CHAPTER VII POWERS OF THE U.N. SECURITY COUNCIL* 5 (2004); see also Frowein & Kirsch, *Introduction*, *supra* note 44, at 705; King, *supra* note 45, at 517; Keith Harper, *Does the United Nations Security Council Have the Competence to Act As Court and Legislature?*, 27 N.Y.U. J. INT'L L. & POL. 103, 105 (1994).

52. In determining the existence of a threat to international peace and security, the Council is not limited by either the text or negotiating history of the Charter. Although some participating in the negotiations of the Charter recommended defining the terms of Article 39 with greater specificity, it was finally decided that this would limit the Council's ability to act effectively against a threat to international peace and security. See Stromseth, *Imperial Security Council*, *supra* note 24, at 42 (writing that the Charter's framers "deliberately left the terms in Article 39 undefined to give the Security Council flexibility in responding to new threats to the peace that might emerge"); see also Happold, *supra* note 2, at 600; J.A. Frowein & N. Kirsch, *Article 39*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 717, 722, 726 (Bruno Simma et al. eds., 2d ed., 2002); Harper, *supra* note 51, at 149.



intra-State conflicts.<sup>53</sup> In the post-September 11th world, including through the adoption of Resolutions 1373 and 1540, the concept of "threat to the peace" has been further expanded to encompass global threats posed by non-State actors such as terrorists and terrorist organizations. This broadening of the Council's view of what constitutes a "threat to international peace and security" has resulted in a corresponding broadening of the types of measures it has chosen to impose on States in an attempt to address the threat.<sup>54</sup>

Article 41 of the Charter states that the Council "may decide what measures not involving the use of armed force are to be employed to give effect to its decisions" and then provides an illustrative list of possible measures.<sup>55</sup> According to Oscar Schachter and others, the language in Article 41 is broad enough to cover any type of action not involving the use of force, which is addressed in Article 42.<sup>56</sup> As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has stated, the Article provides "a negative definition . . . It only prescribes what measures cannot be taken."<sup>57</sup> Thus, once the Council determines that a particular situation poses a threat to peace and security, it has broad discretion to choose the proper course of action. The need for the Council to take efficient action reinforces this view.<sup>58</sup>

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53. *But see* DE WET, *supra* note 51, at 150-75 (arguing that in all of these instances, except Somalia, the potential involvement of neighboring countries in the internal conflict, or humanitarian crisis, was a concrete risk and that this was a significant factor in helping the Council find the existence of an threat to "international peace and security").

54. *See, e.g.,* Stromseth, *Imperial Security Council*, *supra* note 24, at 42; A. Paulus, *Article 29, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 539, 548-62 (Bruno Simma et al. eds., 2002) [hereinafter Paulus, *Article 29*].

55. U.N. CHARTER art. 41.

56. *See* Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1, 12 (1988); *see also*, Happold, *supra* note 2, at 594; J.A. Frowein & N. Kirsch, *Article 41, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 735, 740 (Bruno Simma et al. eds., 2d ed., 2002) [hereinafter Frowein & Kirsch, *Article 41*]. *But cf.* Gaetano Arrangio-Ruiz, *On the Security Council's "Law-Making"*, 83 RIVISTA DI DIRITTO INTERNAZIONALE 609, 723 (2000) (arguing that "for such a sweeping statement to be legally exhaustive it must be complemented by another general qualification, which applies to the whole of Chapter VII, including Articles 41 and 42," namely that Chapter VII measures must be "peace-enforcement measures rather than law-enforcing, law-making or law-determining measures.").

57. *Prosecutor v. Tadic*, Case IT-94-I-AR72, [1995] Int'l Crim. Trib. For Fmr. Yugoslavia (Appeals Chamber), *reprinted in* [1996] 35 I.L.M. 32, 44.

58. U.N. CHARTER art. 24, ¶ 1.

The Council's powers under Chapter VII are broad and subject to few express limitations.<sup>59</sup> Article 24(2) imposes the main constraint on Council activity, stating that the Council must act in accordance with the "Principles and Purposes of the United Nations," which are listed in Articles 1 and 2 of the Charter.<sup>60</sup> These include the promotion and respect for human rights, the development of friendly relations among Nations, and respect for the sovereign equality of all States.<sup>61</sup> Two significant "principles and purposes," however, explicitly do not apply to the Council when acting under Chapter VII: the principle that restricts the United Nations "from intervening in matters which are essentially within the domestic jurisdiction of any State" (Article 2(7))<sup>62</sup> and the need to act "in conformity with the principles of justice and international law" (Article 1(1)).<sup>63</sup> If applicable, this latter principle would considerably limit the Council's options under Chapter VII. However, a close reading of Article 1(1) of the Charter reveals that this limitation only applies to the Council's activity under Chapter VI, i.e., when it exercises its dispute settlement powers.<sup>64</sup> Therefore, the measures the Council seeks to impose to address threats to peace and security need not be consistent with existing international law and may touch upon issues of largely domestic concern. As a further indication of the freedom of action and power given to the Council under the Charter, Article 103 makes clear that States' obligations under the Charter prevail over conflicting treaty obligations.<sup>65</sup>

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59. See Frowein & Kirsch, *Introduction*, *supra* note 44, at 707; see also Lamb, *supra* note 44, at 370-74; LELAND M. GOODRICH ET AL., *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS*, 267-69 (3d ed. 1969) (noting that the Charter text and the *travaux préparatoire* make it clear that the Council is given broad discretion in exercising its Chapter VII powers); HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 96, 275, 295 (1951).

60. U.N. CHARTER art. 24, ¶ 2.

61. U.N. CHARTER arts. 1-2.

62. U.N. CHARTER art. 2, ¶ 7.

63. U.N. CHARTER art. 1, ¶ 1.

64. See Frowein & Kirsch, *Introduction*, *supra* note 44, at 710; see also Bernd Martenczuk, *The Security Council, the International Court, and Judicial Review: What Lessons from Lockerbie?*, 10 EUR. J. INT'L L. 517, 545 (1999); Lamb, *supra* note 44, at 370; HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 294 (1950).

65. See U.N. CHARTER art. 103. It is also widely accepted that Charter obligations prevail over conflicting obligations under customary international law. See, e.g., DE WET, *supra* note 51, at 182; Alvarez, *War on Terrorism*, *supra* note 11, at 132; Harper, *supra* note 51, at 132. Some assert, however, that the Security Council may not adopt measures that would violate principles of *jus cogens* (i.e., peremptory norms of international law).

In addition to respecting the relevant Charter "purposes and principles," the Council's behavior is also limited by the "proportionality principle," under which the Council's action must be appropriate and necessary for the achievement of its stated purposes — generally, the removal of the threat to peace and security — and may not disproportionately affect other interests.<sup>66</sup> Thus, Chapter VII measures may violate the Charter if their impact is clearly out of proportion to the aims pursued.

Some, in fact, argue that very far-reaching powers are conferred upon the Council on the condition that it confine its activities to short-term measures limited to preliminary effects, leaving a definitive settlement of the conflict to the parties.<sup>67</sup> As soon as the targeted State has complied with the measures so that the threat to peace and security has dissipated, the measures imposed by the Council are to be terminated or removed.<sup>68</sup> Furthermore, some scholars have qualified the broad Council Chapter VII powers by stating that the Council can only adopt peace-enforcing measures rather than law-making, law-enforcing, or law-determining measures.<sup>69</sup> Although these limitations are not in the Charter's text, and have not been evidenced by Council

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*See, e.g.,* DE WET, *supra* note 51, at 180; Lamb, *supra* note 44, at 370; King, *supra* note 45, at 562. Judge Eliau Lauterpacht articulated this position in his separate opinion in the Bosnia case. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), [1993] I.C.J. 1, 440 (separate opinion of Lauterpacht, J.).

66. *See generally* Georg Nolte, *Article 2(7)*, in *THE UNITED NATIONS CHARTER: A COMMENTARY* 148, 171 (Bruno Simma eds., 2d ed. 2002); Frowein & Kirsch, *Introduction*, *supra* note 44, at 711; Kirgis, *supra* note 11, at 517. The more the Security Council acquires a constitutional function, the more the principle of proportionality ought to gain currency as a general limitation of U.N. actions. *See* Nicolas Angelet, *International Law Limits to the Security Council*, in *UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW* 72 (Vera Gowlland-Debbas et al. eds., 2001). *But see* DE WET, *supra* note 51, at 184-85 (arguing that the freedom of the Council "to choose a combination of measures under Chapter VI and/or VII to be adopted for the maintenance of international peace and security already indicates that it is not bound by a general principle of proportionality." Requiring the Council to exhaust all non-binding or non-military enforcement measures before authorizing the use of force would not be consistent with the need to give the Council sufficient flexibility to act quickly and efficiently.).

67. *See* Frowein & Kirsch, *Introduction*, *supra* note 44, at 705. *But see* Arrangio-Ruiz, *supra* note 56, at 637-82.

68. *See* Happold, *supra* note 2, at 602. *But see* Frowein & Kirsch, *Introduction*, *supra* note 44, at 714 (noting "particular problems that have arisen with respect to termination of Chapter VII measure"); David Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993) (highlighting the difficulties in terminating Chapter VII measures).

69. *See* Arrangio-Ruiz, *supra* note 56, at 723-24.

practice since 1990, these limitations are consistent with the widely-held view that the Security Council serves as the global police in the U.N. structure, with the General Assembly mandated to recommend longer-term prescriptions for generally addressing international peace and security.<sup>70</sup> In short, the long-held view has been that the Council responds to specific situations and the General Assembly acts prospectively.<sup>71</sup> The Council, it is argued, does not have a mandate to enunciate future rules of general conduct for an indefinite period of time — what this Article refers to as “global legislation” — as in fact it did in both Resolution 1373 and Resolution 1540.<sup>72</sup> Rather, the Council must restrict itself to addressing the particular situation, with a temporary, case-related reaction. This interpretation, it is argued, is supported by the types of measures explicitly mentioned in both Articles 41 and 42, *e.g.*, “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”<sup>73</sup>

To summarize briefly, in acting under Chapter VII, the

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70. See U.N. CHARTER art. 11, ¶ 1 (providing that “[t]he General Assembly may consider the general principles of co-operation in the maintenance of peace and security . . . and may make recommendations with regard to such principles to the Members or to the Security Council or to both.”); see also Martti Koskenniemi, *The Police in the Temple — Order, Justice and the U.N.: A Dialectical View*, 6 EUR. J. INT’L L. 325 (1995); Frowein & Kirsch, *Introduction*, *supra* note 44, at 708. According to some, this view is implicit in the division of functions in the Charter between the Council and the General Assembly:

[t]he Charter — on the assumption that the General Assembly was the organ of deliberation and the Council an organ of action — defined in considerable detail the functions and powers of each, emphasizing the primary responsibility of the Council for making specific decisions to maintain or restore peace and security, and the responsibility of the General Assembly to develop and recommend general principles of co-operation for strengthening peace and security.

GOODRICH ET AL., *supra* note 59, at 11.

71. See Happold, *supra* note 2, at 600 (noting that the Council “cannot legislate to prevent threats from arising”); see also Alvarez, *Hegemonic*, *supra* note 2, at 874.

72. See Happold, *supra* note 2, at 608; see also Frowein & Kirsch, *Introduction*, *supra* note 44, at 708-09; Arrangio-Ruiz, *supra* note 56, at 629; Michael Wood, *The Interpretation of Security Council Resolutions*, MAX PLANCK Y.B. U.N. L. 77 (1998). The only reference to “legislation” in the Charter is found Article 13, which provides that the General Assembly “shall initiate studies and make recommendations for the purpose of: (a) . . . encouraging the progressive development of international law and its codification.” U.N. CHARTER art. 13, ¶ 2. Under this authority, the General Assembly has adopted dozens of treaties in numerous fields of international law.

73. Arrangio-Ruiz, *supra* note 56, at 629. See Karl Zemanek, *Is the Security Council the*

Council can make recommendations or decisions relating to a particular situation or dispute. In exercising this latter function, it is generally accepted that that Council may impose obligations (which under Article 103 prevail over any conflicting treaty, and presumably customary law, and obligations); it may reaffirm and/or apply existing rules; and it may depart or override such rules. Furthermore, there appears to be no legal limitation in the Charter that prohibits the Council from using its Chapter VII authority in a legislative capacity.<sup>74</sup> Again, a traditional caveat to all of the above concepts has been that the Council may only do so in discrete cases, involving a specific threat to peace and security.<sup>75</sup> However, to continue to read such a limitation into the Charter at a time when the most urgent threats to international peace and security are limited by neither time nor geography would prevent the Council from fulfilling its responsibility under the Charter to maintain international peace and security through "prompt and effective action."

To argue that the Charter provides the Council with the principal responsibility for maintaining international peace and security, grants it broad discretion both to determine the existence of threats to peace and security and determine the means for addressing such threats, but does not grant a mandate to impose binding obligations of a legislative character on all States begs the following question: What if, in order to address a threat effectively, the Council determines that imposing binding obligations on all States to criminalize certain activity and increase

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*Judge of Its Own Legality*, in *LIBER AMICORUM MOHAMMED BEDJAOUI* 629, 636-37 (Emile Yakpo & Tahar Boumedra eds., 1999).

74. See Alvarez, *Hegemonic*, *supra* note 2, at 874; see also Szasz, *supra* note 2, at 904; Frowein & Kirsch, *Introduction*, *supra* note 44, at 709; Kirgis, *supra* note 11, at 520; Harper, *supra* note 51, at 149.

75. See Happold, *supra* note 2, at 599; see also Laval, *supra* note 2, at 421 (arguing that the authors of Chapter VII of the U.N. Charter did not intend to provide collective security in instances where State action "if at all present, [is] only a secondary element" of the threat" and that the measures under Article 41 of the Charter are to apply only to [S]tates."); Nicolas Angelet, *International Law Limits to the Security Council*, in *UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW* 71, 77 (Vera Gowlland-Debbas et al. eds., 2000). Writing a few years before the Security Council entered its so-called "legislative" phase, the British Foreign Office Legal Adviser wrote that while the Council has some attributes of a legislature, "it is misleading to suggest that the Security Council acts as a legislature, as opposed to imposing obligations on States in connection with particular situations or disputes . . . but it does not lay down rules of general application." Wood, *supra* note 72, at 77. The United Kingdom, of course, voted in favor of the adoption of both Security Council Resolutions 1373 and 1540.

domestic capacities to combat the threat is necessary? (The situation facing the Council when it adopted Resolutions 1373 and 1540.) Presumably, if the Council thought that the lack or weakness of existing counter-terrorism or counter-proliferation legislation and regulations in a particular country posed a specific threat to peace and security, few would question its authority under Chapter VII to adopt a resolution requiring that State to take certain steps to enhance its capacity. It is also difficult to dispute the fact that the existing terrorist and counter-proliferation threats are global in nature, and thus, require global responses. Imposition of such requirements was not a proportional response to the threat. Thus, it would be logical for the Council to claim the authority under Chapter VII to impose these same requirements on all States.

### III. *SECURITY COUNCIL PRACTICE: THE EXERCISE OF ITS "LEGISLATIVE" AUTHORITY UNDER ARTICLE 41 OF THE U.N. CHARTER*

Given the Cold War paralysis in the Council that prevented it from addressing the most serious threats to international peace and security, discussion surrounding the scope of the Council's authority remained largely academic during the first 45 years of its existence.<sup>76</sup> At this time, the Council adopted Chapter VII enforcement measures to respond to a threat to or breach of international peace and security on only two occasions: imposing economic sanctions against the racist minority regime in Southern Rhodesia in 1966 and military sanctions against the apartheid regime of South Africa in 1977.<sup>77</sup> Since 1990, however, the Council has used its Chapter VII powers on a regular basis, adopting more than 250 Chapter VII resolutions and a wide range of enforcement measures.<sup>78</sup>

During the past fourteen years, with the Cold War over and

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76. See King, *supra* note 45, at 509.

77. The Security Council-imposed embargo against the racist regime in Southern Rhodesia was lifted in 1979 and the arms embargo against apartheid South Africa remained in place until 1994. See DE WET, *supra* note 51, at 1; see also Frowein & Kirsch, *Article 41*, *supra* note 56, at 738; Vera Gowlland-Debbas, *COLLECTIVE RESPONSES TO ILLEGAL ACTS IN INTERNATIONAL LAW: UNITED NATIONS ACTION IN THE QUESTION OF SOUTHERN RHODESIA* 423-663 (1990).

78. See Sydney D. Bailey & Sam Daws, *THE PROCEDURE OF THE U.N. SECURITY COUNCIL* tbl. 13 (3d ed. 1998) (listing Security Council resolutions adopted under Chapter VII); see also Rome U.N. Conference Report, *supra* note 4, at 14.

the P5 deadlock broken, the debate surrounding the scope of the Council's powers under Chapter VII has assumed practical significance, as the Council has adopted a wide variety of enforcement measures. These measures have ranged from extensive economic embargoes, the authorization of States and regional organizations to use force, the demarcation of a boundary, the creation of a claims commission, the creation of *ad hoc* tribunals, the creation of civil administrative authorities to administer territories, the imposition of targeted financial, arms, and travel sanctions, to the adoption of the measures that are the subject of this Article, namely, the imposition of binding obligations on all Member States.<sup>79</sup> Article 41 of the Charter has generally provided the legal basis for this Council activity.<sup>80</sup> As noted in Part II of this Article, in the post-Cold War era, the notion of a "threat to the peace" has undergone considerable change, particularly with respect to internal situations.<sup>81</sup> Many of the Council's innovative enforcement measures under Article 41 were adopted to address these new threats. In a number of these instances, the Council imposed binding obligations on one or more States, which has been characterized by some as the exercise of the Security Council's legislative authority.

Part III will discuss the resolutions the Council adopted prior to September 2001 that have been described as legislative in nature, some of which imposed binding obligations on all States. It will focus on the Council's establishment of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), which, prior to the adoption of Resolution 1373 in September 2001, constituted arguably the most innovative and far-reaching use of the Council's Chapter VII authority. Moreover, many of the same concerns surrounding the Council's decision to create the tribunal, which centered on whether the Council was legislating or law-making, were echoed when the Council adopted

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79. See generally DAVID M. MALONE, *THE U.N. SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* (2004) (discussing the Security Council's activity under Chapter VII since 1990). See David Malone, *The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the U.N. Charter*, 35 N.Y.U. J. INT'L POL. 487 (2003); see also J.A. Frowein & N. Kirsch, *Chapter VII. Action with respect to Threats to the Peace and Breaches of the Peace, and Acts of Aggression*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 701-806 (2d ed. 2002).

80. See U.N. CHARTER art. 41.

81. See *supra* pt. II.

Resolutions 1373 and 1540.<sup>82</sup> Part III will conclude that these two post-September 11th resolutions are qualitatively different from previous resolutions. The manifestations of the difference, however, serve to highlight the innovative rather than the *ultra vires* nature of this activity.

#### A. Previous Security Council "Legislative" Practice

The Security Council has exercised its legislative power on a number of occasions to address threats to international peace and security posed by State or State-sponsored terrorism, which, prior to September 11th, was the focus of the Council's anti-terrorism efforts. For example, when Libya failed to renounce terrorism and respond to the Council's request to extradite those suspected of being responsible for the bombing of Pan Am Flight 103, the Council obligated Libya to surrender the suspects.<sup>83</sup> The Council took this action despite the fact that the demand was in conflict with Libya's existing multilateral treaty obligations, which are based on the principle *aut dedere aut judicare*.<sup>84</sup> At the time, this Council decision was perhaps the clearest illustration of its legislative activity. Not only did it create new obligations for a State, but it did so in direct conflict with a binding multilateral treaty obligation that addressed the specific issue, and to which most Council members and Libya were parties.<sup>85</sup> Additionally, the Council used its Chapter VII authority to impose sanctions against Libya, and in doing so, required all States to take a series of measures against the Government of Libya and its officials.<sup>86</sup>

The Council subsequently adopted similar approaches in the cases of both Afghanistan and Sudan, subjecting each to en-

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82. See Happold, *supra* note 2, at 596; see also Lamb, *supra* note 44, at 376-79; Kirgis, *supra* note 11, at 524; Harper, *supra* note 51, at 126.

83. See S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg., U.N. Doc. S/748 (1992).

84. See *id.* ¶ 1. Libya was a party to the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, under which Libya was obligated to prosecute or extradite an "alleged offender." See Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, art. 7, 24 U.S.T. 564, 974 U.N.T.S. 177.

85. See Happold, *supra* note 2, at 596; see also Kirgis, *supra* note 11, at 515; Harper, *supra* note 51, at 126-29.

86. See S.C. Res. 748, *supra* note 83, ¶¶ 4-6 (stating that the Council required all Member States to impose diplomatic, arms, and economic sanctions on Libya for its support of terrorist activity).



forcement measures for their failure to comply with earlier Council requests to extradite terrorist suspects for trial.<sup>87</sup> In each instance, however, not only did the Council impose binding obligations on the non-complying State, but on all other States as well.<sup>88</sup>

Perhaps the most controversial, yet innovative, exercise of the Council's Chapter VII powers prior to September 11th was its decision to establish an *ad hoc* criminal tribunal for the former Yugoslavia to prosecute those responsible for committing serious violations of international humanitarian law.<sup>89</sup> In doing so, it also adopted a statute deciding both the substantive and procedural rules to be applied by the Court.<sup>90</sup> The legitimacy of this Council action was the subject of much debate, focusing mainly on whether, in establishing the tribunal and adopting the statute, the Council, a political organ, was exercising judicial and/or legislative functions which it arguably did not possess.<sup>91</sup>

The Appeals Chamber of the ICTY concluded that the Council did have the authority under Article 41 to establish the Court, thus reinforcing the Secretary-General's position.<sup>92</sup> The Secretary-General's conclusion was based on two important fac-

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87. See S.C. Res. 1054, U.N. SCOR, 51st Sess., 3660th mtg. at ¶ 3, U.N. Doc. S/1054 (1996) (requiring all States to impose diplomatic and travel sanctions against the Government of Sudan and its officials); see also S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg. at 4, U.N. Doc. S/1267 (1999) (requiring all States to impose aviation and financial sanctions against the Taliban).

88. See *id.*

89. See Happold, *supra* note 2, at 596; see also Arrangio-Ruiz, *supra* note 56, at 722; Harper, *supra* note 51, at 126-29. The Council followed this precedent when it established the International Criminal Tribunal for Rwanda. See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. U.N. Doc. S/955 (1994).

90. See Statute of International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704/Annexes (1993); see also Statute of International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess. Annex, 3217th mtg., U.N. Doc. S/RES/827 (1993), amended by S.C. Res. 1166, U.N. SCOR, Annex, U.N. Doc. S/RES/1166 (1998) [hereinafter ICTY Statute].

91. See Arrangio-Ruiz, *supra* note 56, at 722; see also Lamb, *supra* note 44, at 376.

92. See Prosecutor v. Tadic, Case IT-94-I-AR72, [1995] Int'l Crim. Trib. For Fmr. Yugoslavia (Appeals Chamber), reprinted in [1996] 35 I.L.M. 32, 44-45 (Jan. 1996); see also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993) [hereinafter *Secretary-General's Report*] (reporting on aspects of establishing an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia).

tors. First, that the Council did indeed have the authority under Chapter VII, as it was acting in response to a particular situation constituting a threat to international peace and security, and the measure was aimed at restoring the peace by ending the threat.<sup>93</sup> Second, by assigning the tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Council would not be creating or purporting to "legislate" that law.<sup>94</sup> Rather, the tribunals would have the task of applying existing international humanitarian law.<sup>95</sup> The tribunal was empowered to apply only those provisions of international humanitarian law that were clearly part of customary international law.

The Secretary-General's report, however, did not address some of the potentially far-reaching implications of certain procedural provisions of the ICTY Statute, which the Council annexed to the resolution establishing the ICTY. Such provisions could be viewed as "legislative," as they establish new rules that have required some States to change their domestic legal process. One commentator has referred to them as "directives to national governments."<sup>96</sup>

For example, States are to cooperate with the tribunal and give effect to its requests for judicial assistance.<sup>97</sup> Thus, States must stay or defer domestic criminal proceedings for cases falling within the ICTY's jurisdiction when requested by the ICTY to do so.<sup>98</sup> In addition, an ICTY judgment is a bar to subsequent prosecution or retrial before national courts.<sup>99</sup> Such requirements impose significant limitations on States' judicial sovereignty and, in a number of instances, necessitate implementing domestic legislation.

Finally, the Statute obliges "host" or "transit" States to give effect to orders issued by the ICTY for the surrender of ICTY indictees.<sup>100</sup> This Council-imposed obligation limits such States'

93. See *Secretary-General's Report*, *supra* note 92, ¶ 57.

94. See *id.* ¶ 29.

95. See Happold, *supra* note 2, at 596, 603; see also Frowein & Kirsch, *Introduction*, *supra* note 44, at 709; Lamb, *supra* note 44, at 376; Kirgis, *supra* note 11, at 523.

96. Kirgis, *supra* note 11, at 524.

97. See ICTY Statute, *supra* note 90, art. 29.

98. See ICTY Statute, *supra* note 90, art. 9; see also ICTY, Rules of Procedure and Evidence, Feb. 11, 1994, as amended Feb. 11, 2005, R. 10.

99. See ICTY Statute, *supra* note 90, art. 10.

100. See ICTY Statute, *supra* note 90, art. 29; see also Daphna Sharga & Ralph Zack-

ability to exercise universal jurisdiction over those suspected of committing crimes against humanity or war crimes.<sup>101</sup>

In the Security Council meeting at the adoption of Resolution 827, representatives from a number of Council Members stressed the unprecedented nature of this initiative, and explained that their support for it was based on a number of factors.<sup>102</sup> These factors included "the very special circumstances pertaining in the former Yugoslavia"<sup>103</sup> and that it was "an exceptional step needed to deal with exceptional circumstances,"<sup>104</sup> as well as the fact that the Council was not establishing norms of international law or seeking to legislate.<sup>105</sup> Members were well aware, however, of the burdens the Statute would impose on all States. Some alluded to the obligations the resolution imposes on States to establish their own procedures for implementing their obligations under the Statute.<sup>106</sup> As the French Ambassador stated, "all States are required to cooperate fully with the Tribunal, even if this obliges them to amend certain provisions of their domestic law."<sup>107</sup> Interestingly, many of these arguments were to be used more than ten years later to justify supporting Council Resolution 1540.

Although no Council Member voted against the Resolution, two made it clear that establishing a tribunal via a Security Coun-

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lin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 EUR. J. INT'L. L. 1, 2 (1994).

101. See Sharga & Zacklin, *supra* note 100, at 14.

102. See Statement by Ronaldo Mota Sardenberg, Permanent Representative of Brazil, to the United Nations, U.N. SCOR, 48th Sess., 3217th mtg. at 34, U.N. Doc. S/PV.3217 (1993); see also Statement by Representative of Japan, to the United Nations, U.N. SCOR, 48th Sess., 3217th mtg. at 23, U.N. Doc. S/PV.3217 (1993); Statement by Sir David Hannay, Representative of the United Kingdom, to the United Nations, U.N. SCOR, 48th Sess., 3217th mtg. at 18, U.N. Doc. S/PV.3217 (1993); Statement by Representative of Venezuela, to the United Nations, U.N. SCOR, 48th Sess., 3217th mtg. at 8, U.N. Doc. S/PV.3217 (1993).

103. Statement by Sir David Hannay, Representative of the United Kingdom, *supra* note 102, at 18.

104. *Id.*

105. See *id.* at 19.

106. See Statement by Juan Yanez-Barnuevo, Representative of Spain, to the United Nations, U.N. SCOR, 48th Sess., 3217th mtg. at 41, U.N. Doc. S/PV.3217 (1993); see also Statement by Sir David Hannay, Representative of the United Kingdom, *supra* note 102, at 19; Statement by Madeleine Albright, Representative of the United States, to the United Nations, U.N. SCOR, 48th Sess., 3217th mtg. at 15, U.N. Doc. S/PV.3217 (1993).

107. Statement by Jean-Bernard Merimee, Representative of France, to the United Nations, U.N. SCOR, 48th Sess., 3217th mtg. at 12, U.N. Doc. S/PV.3217 (1993).

cil resolution was not their preferred approach, again rehearsing the same arguments used surrounding the adoption of Resolution 1540. China argued that to avoid abuse of Chapter VII powers, a tribunal should be established to prosecute serious violations of international humanitarian law using the traditional international law-making method, namely, the negotiation and adoption of a treaty.<sup>108</sup> The adoption of the Statute by means of a Security Council resolution, China cautioned, meant that all U.N. Members must implement it to fulfill their obligations under the U.N. Charter.<sup>109</sup> Brazil agreed, stating that it would have preferred the initiative to establish a criminal tribunal to have been brought to the attention of the U.N. General Assembly.<sup>110</sup> Negotiating a multilateral treaty in a more representative body such as the General Assembly, Brazil pointed out, would have been the most appropriate method for establishing a tribunal.<sup>111</sup> Moreover, at the time when the Security Council was considering whether to establish the tribunal, various Member States echoed this sentiment.<sup>112</sup>

As has been pointed out, it would have been technically possible to adopt a criminal code and establish a tribunal to prosecute those responsible for violations of international humanitarian law via the adoption of an international treaty.<sup>113</sup> However, it would have taken years for States to negotiate, sign, and ratify such a convention.<sup>114</sup> Given the urgent threat, the Council

108. See Statement by Li Zhaoxing, Representative of China, to the United Nations, U.N. SCOR, 48th Sess., 3217th mtg. at 33, U.N. Doc. S/PV.3217 (1993).

109. See *id.* It is worth noting that China abstained on Security Council Resolution 955, which established the International Criminal Tribunal for Rwanda. See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/955 (1994).

110. See Statement by Ronaldo Mota Sardenberg, Representative of Brazil, *supra* note 102, at 36.

111. See *id.*; see also, Arrangio-Ruiz, *supra* note 56, at 720.

112. See Note Verbale from the Permanent Representative of the Netherlands, to the United Nations addressed to the Secretary-General, U.N. SCOR, 48th Sess., at 2, U.N. Doc. S/25716 (1993). For example, the Netherlands said that the multilateral treaty was "the most solid legal basis for the establishment of a tribunal." *Id.* The Netherlands added, however, that the establishment of the tribunal by the Council "seems appropriate" under the circumstances, given the "complicated and time-consuming process" involved in concluding a treaty. *Id.* See Note Verbale from the Permanent Mission of Mexico to the United Nations, addressed to the Secretary-General, U.N. SCOR, 48th Sess., at 2, U.N. Doc. S/25417 (1993).

113. See Sharga & Zacklin, *supra* note 100, at 2.

114. See Ralph Zacklin, *Some Major Problems in the Drafting of the ICTY Statute*, 2 J. INT'L CRIM. JUST. 361 (2004) ("[E]ven if the negotiation and signature stages [of the

chose the more expedient route, namely adoption by a Security Council resolution, choosing to forego the more traditional, but cumbersome, law-making approach.

Only Brazil and China voiced a preference for establishing the ICTY via the more traditional law-making route, *i.e.*, the General Assembly. Others, however, while supporting Council action, urged the General Assembly to continue to work towards the establishment of a permanent international criminal court with general jurisdiction so as to obviate the need for the Council to establish future *ad hoc* tribunals.<sup>115</sup> This support for parallel action, for the Council to use its Chapter VII powers in response to an urgent situation to fill a lacuna in the international law framework — *i.e.*, the lack of a permanent international criminal court — and for the General Assembly to negotiate a treaty to fill the lacuna permanently and for all situations, was to be echoed during the debates surrounding the adoption of Resolution 1540.

#### *B. Resolutions 1373 and 1540 vs. Previous Security Council Practice*

The above-cited examples, as well as the numerous arms, travel, and financial sanctions the Council has imposed on different countries (in addition to those mentioned above) and, in certain cases, non-State actors, have imposed occasionally far-reaching obligations on some, and occasionally all, U.N. Members. Nevertheless, Resolution 1373 and Resolution 1540 can be seen as a qualitatively different exercise of the Council's Chapter VII power. This difference is manifested in a number of ways. Although it highlights the innovative nature of the Council's activity, it does not leave this activity outside the Charter framework.

First, in the above instances, and in fact all prior Security Council use of its Chapter VII powers, the Council was responding to a specific situation. In previous cases when the Council was addressing the threat posed by terrorism, the threat emanated from the failure of a single State to cooperate in the fight

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treaty-making process] could be compressed into a relatively short span of time — say, 12 months — ratification to bring the treaty into force could take many years.”).

115. See, *e.g.*, Statement by Juan Yanez-Barnuevo, Representative of Spain, *supra* note 106, at 41; Statement by Sir David Hannay, Representative of the United Kingdom, *supra* note 102, at 17.

against terrorism. It established the ICTY to address the armed conflict in a specific region of the world, the former Yugoslavia. In adopting Resolutions 1373 and 1540, however, the Council was responding to global threats and offering a global approach to help address them. Its responses were not merely directed at a particular terrorist act, but at all future acts of terrorism.<sup>116</sup> As one critic has written, with Resolution 1373 the Council has adopted "a series of general and temporally undefined legal obligations binding the member [S]tates[, which] goes beyond the limits of the Security Council's powers."<sup>117</sup> In short, here the Council is seen as a "global law maker."<sup>118</sup>

Second, by their nature, the sanctions or other obligations imposed on all States, prior to the adoption of Resolutions 1373 and 1540, were imposed for a limited purpose: to secure compliance with the targeted State. Thus the Resolutions are explicitly or implicitly time-limited until the purpose is accomplished.<sup>119</sup> For example, the resolution imposing sanctions against the Government of Sudan states that the binding obligations imposed on all States "shall remain in force until the Council determines that the Government of Sudan has complied [with the requirements in the resolution]."<sup>120</sup> Although the obligations that the ICTY Statute imposes on States may constitute legislation in form, it is in principle limited to a specific, time-limited situation. Thus, when the threat to the peace that has given rise to the establishment of the tribunal disappears, the Council will close the tribunal. As evidence of this, the Council has endorsed a "completion strategy" for wrapping up the court's work and shutting it down.<sup>121</sup> Moreover, although in cases such as Iraq,

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116. See DE WET, *supra* note 51, at 172; see also Rosand, *Cornerstone of the United Nations*, *supra* note 30, at 603; Paulus, *Article 29*, *supra* note 54, at 553; Report of the Policy Working Group on the United Nations and Terrorism, U.N. GA/SCOR, 57th Sess., Annex 1 at 8, U.N. Doc. A/57/273 – S/2002/875 (2002), available at <http://www.un.org/terrorism/a57273.htm> (last visited Mar. 19, 2005).

117. Happold, *supra* note 2, at 607.

118. See Alvarez, *War on Terrorism*, *supra* note 11, at 120.

119. See Szasz, *supra* note 2, at 901.

120. S.C. Res. 1054, *supra* note 88, ¶ 2.

121. See Statement of the President of the Security Council, U.N. SCOR, 4582d mtg., U.N. Doc. S/PRST/2002/21 (2002) (endorsing the ICTY's strategy for completing investigations by the end of 2004, completing all trial activities at first instance by the end of 2008, and completing all of its work in 2010 as outlined in the Report on the Judicial Status of the ICTY and the Prospects for Referring Certain Cases to National Courts, U.N. Doc. S/2002/678); see also Dominic Raab, *Evaluating the ICTY and its Com-*

the former Yugoslavia, and Sierra Leone, the Council-imposed sanctions were in force for years, once the Council determined that the reasons underlying the sanctions no longer existed, the sanctions were removed.<sup>122</sup> Neither Resolution 1373 nor Resolution 1540 contains an explicit or implicit time limitation. Presumably, they will remain in force until the global threats to which they are responding disappear. Given the nature of the terrorist threat and the threat posed by the proliferation of WMD, however, this could mean decades.

Third, while there is a litany of examples where the Council imposed obligations on States, sometimes requiring them to amend their domestic legislation, in none of them did the Council, as it did in Resolution 1373 and Resolution 1540, lay down a broad set of rules or norms. In the Secretary-General's report on the establishment of the ICTY the Secretary-General made it clear that by adopting the ICTY Statute the Council would not be establishing new laws, but rather restating existing ones.<sup>123</sup> The same, however, cannot be said with respect these two post-September 11th resolutions. Here, the Council sought to establish a new set of legal norms in the area of counter-terrorism and counter-proliferation respectively. And it did so in areas of law where it is usually left to States to agree among themselves, where other international bodies have been working for a number of years, and which are already governed by extensive multi-lateral treaty regimes.

### C. Resolutions 1373 and 1540 as Leaves on the "Living Tree"

Despite the unique nature of Resolutions 1373 and 1540, the discretion given to the Council under the Charter, both in

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*pletion Strategy: Efforts to Achieve Accountability for War Crimes and their Tribunals*, 3 J. INT'L CRIM. JUST. 82 (2005); David Pimentel, *Technology in a War Crimes Tribunal: Recent Experience at the ICTY*, 12 WM. & MARY BILL RTS. J. 715, 717 n.11 (2004).

122. See Frowein & Kirsch, *Introduction*, *supra* note 44, at 709.

123. See *Secretary-General's Report*, *supra* note 92, at 8; see also Zacklin, *supra* note 114, at 363. Zacklin states:

[T]he first humanitarian impulse was to use the powers available to the Security Council under Chapter VII to legislate for the Tribunal. This impulse, while understandable, had to be resisted . . . . To use Chapter VII in order to legislate for Member [S]tates would have constituted a highly controversial extension of the Security Council's competence and one which might very well have called into question the fundamental legal basis of the Tribunal itself.

Zacklin, *supra* note 114, at 363.

terms of determining the existence of threats to the peace and the appropriate enforcement measures to address such threats, appears broad enough to allow for this innovative activity. During its nearly sixty-year life, the notion of what is permissible under the Charter has evolved as the Council has been forced to grapple with new threats to international peace and security. These threats facing the international community are not the same as they were ten, let alone sixty, years ago, and thus neither should be the tools available to the Council for addressing them.<sup>124</sup> Some have criticized the expansion of the Council's tool-kit as weakening the constitutional integrity of the U.N. Charter system.<sup>125</sup> Others, however, take a more realistic approach and view most of the changes as acceptable steps in the Charter's development as a living document, or what Thomas Franck, and many others have called a "living tree,"<sup>126</sup> which like the U.S. Constitution, was "deliberately designed by its founders to have the capacity to meet new threats to peace and security."<sup>127</sup> As a "constitution," the Charter must be allowed to develop with the times so as to be able to deal effectively with the ever-changing international environment in which it operates.<sup>128</sup>

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124. See Kirgis, *supra* note 11, at 506.

125. See Arrangio-Ruiz, *supra* note 56, at 630, 686-88, 700; see also Koskenniemi, *supra* note 70, at 338-39.

126. See FRANCK, *RECOURSE TO FORCE*, *supra* note 45, at 5; see also MALONE, *supra* note 79, at 487; Sohn, *supra* note 44, at 169-229; Kirgis, *supra* note 11, at 506.

127. Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 633 (2003) ("Particularly during the last decade, there has been an evolution in the Security Council's interpretation of the rules that shows the ability of the system to adapt. Rigid textualist interpretations of the Charter may well be dead, but it is not clear that they were ever really alive."). Britain's Lord Halifax highlighted the importance of providing the United Nations and its members the necessary flexibility with new situations that could not be foreseen in 1945. Speaking at the San Francisco Conference, he said, "We all want our Organization to have life. . . . We want it to be free to deal with all the situations that may arise in international relations. We do not want to lay down rules which may, in the future, be the signpost for the guilty and a trap for the innocent." Lord Halifax, *Verbatim Minutes of First Meeting of Commission I*, U.N. Doc. 1006, June 15, 1945, in UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION: SELECTED DOCUMENTS, SAN FRANCISCO APRIL 25 - JUNE 26, 1945 529, 537 (1946).

128. See U.N. CHARTER art. 103. The Charter has been described as having "quasi-constitutional" features, as a result of its almost universal adherence and the fact that it has primacy over all other treaties. Article 103 provides that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail." *Id.* According to Professor Franck, this shows that the "drafters intended to create a special treaty different from all others." FRANCK, *RE-*



Nowhere has this need been more apparent than in today's world where perhaps the greatest threat facing us is that posed by non-State terrorists and terrorist groups having global reach and perhaps equally global membership.

Although the Charter had been formally amended on only three occasions during its almost sixty year history, it has proved itself to be capable of evolving through the interpretative practice of its organs.<sup>129</sup> There are two prominent examples of this adaptability involving the Security Council. First, the Council has interpreted Article 27, Paragraph 3 of the Charter to mean that an abstention by a Permanent Member of the Council is not a veto,<sup>130</sup> even though the text says something quite different, namely that "[d]ecisions of the Security Council on all matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members."<sup>131</sup> This Council interpretation, which was confirmed by the International Court of Justice, has allowed Permanent Members to note their displeasure with a proposed resolution, without blocking the Council from adopting it.<sup>132</sup> There are numerous instances where an originalist or strict constructionist interpretation of the Charter would have prevented the Council from taking action to address a threat to peace and security because of the lack of support for such action by one or another P5 member.<sup>133</sup> This oc-

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COURSE TO FORCE, *supra* note 45, at 5. Professor Kirgis has described it as the "constitution of the world community," one which delegates powers to the various organs it has established. See Frederic L. Kirgis, *U.N. Security Council Reform and the Right of Veto: A Constitutional Perspective*, by Bardo Fassbender, 93 AM. J. INT'L L. 975, 975 (1999) (book review). As such, the legality of actions by the Security Council and all other U.N. organs must be judged by reference to the Charter as a "constitution" of delegated powers.

129. See Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 614 (2003). For a description of the amendments, see U.N. CHARTER, Introductory Note. For a thorough discussion of these amendments, the difficulties inherent in trying to amend the Charter, and how interpretation and practice have modified the Charter in certain instances, see Carolyn L. Willson, *Current Development: Changing the Charter: The United Nations Prepares for the Twenty-First Century*, 90 AM. J. INT'L L. 115 (1996).

130. See Wilson, *supra* note 129, at 118.

131. U.N. CHARTER art. 27, § 3.

132. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, 22, ¶ 22 (1971).

133. See FRANCK, RECOURSE TO FORCE, *supra* note 45, at 8 n.16 (listing some of the more than 300 non-procedural resolutions the Council has adopted in which at least one Permanent Member either abstained or did not participate in the vote).

curred most famously with the Council's authorization of Operation Desert Storm in November 1990, despite China's abstention, and most recently with the response to the genocide in Darfur, where the Council again took action under Chapter VII, again with China abstaining.<sup>134</sup>

The Security Council's authorization of peacekeeping operations around the globe is a second prominent example of how the Charter has evolved as a result of the interpretative practices of the Council to allow for activity that could not otherwise be legitimized by a strict constructionist interpretation of the Charter.<sup>135</sup> Nothing in the Charter explicitly authorizes such activity, yet few would argue these activities have not made significant contributions to the Council's ability to successfully maintain international peace and security. With the adoption of resolutions such as 1373 and 1540, one could argue that the Charter has once again evolved to allow the Council to act as a "global legislator" under certain circumstances.<sup>136</sup> Strong pragmatic and legal arguments can be marshaled in support of giving the Council authority under the evolving Charter to adopt resolutions, which

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134. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/687 (1991); S.C. Res. 1556, U.N. SCOR, 59th Sess., 5015th mtg., U.N. Doc. S/1556 (2004).

135. See Erik Suy, *Is the United Nations Security Council Still Relevant? And Was It Ever?*, 12 TUL. J. INT'L & COMP. L. 7, 13 (2004) (stating that the "United Nations, in particular the Security Council, along with the Secretary-General, has invented and developed the concept of peacekeeping as a substitute for failing action under chapter VII"); see also Willson, *supra* note 129, at 123; Kirgis, *supra* note 11, at 532, 538; Rosalyn Higgins, *Peace and Security: Achievements and Failures*, 6 EUR. J. INT'L L. 445, 448 (1995) (noting that "creative activity" occurred in the Council to maximize the possibilities of Article 24 and Chapter VII, "even if colloquially referred to as coming under Chapter Six-and-a-half"). According to a leading authority on U.N. peacekeeping, "[t]he technique of peacekeeping is a distinctive innovation by the United Nations. The Charter does not mention it. It was discovered, like penicillin. We came across it looking for something else, during an investigation of the guerrilla fighting in northern Greece in 1947." Brian Urquhart, *The United Nations, Collective Security, and International Peacekeeping*, in *NEGOTIATING WORLD ORDER: THE ARTISANSHIP & ARCHITECTURE OF GLOBAL DIPLOMACY* 59, 62 (Alan K. Henrikson ed., 1986).

136. See Frowein & Kirsch, *Introduction*, *supra* note 44, at 709. Shortly after the adoption of Resolution 1373, Professors Frowein and Kirsch wrote that if "States continue to endorse the exercise of [global] legislative functions by the Council, the original Charter conception [limiting the Council's authority to time-limited responses to specific situations] might undergo significant change, as it has already done in other areas." *Id.* In the more than three years since then, the Council has seen unprecedented levels of cooperation between all States and the Counter-Terrorism Committee ("CTC"), the body charged with monitoring States' implementation of S.C. Resolution 1373, and has unanimously adopted another resolution of this nature, i.e., S.C. Resolution 1540.

respond to global threats by imposing obligations that establish legal norms designed to address these threats.<sup>137</sup> The Charter grants the Council broad discretion both to determine the existence of a threat to peace and security and the measures to address such a threat. Given the changing nature of what constitutes such a threat, the Charter has demonstrated its ability to evolve with the times.<sup>138</sup>

#### IV. RESOLUTIONS 1373 AND 1540: A WAKE-UP CALL TO THE TRADITIONAL INTERNATIONAL LAW-MAKING PROCESS?

A broad construction of the Council's Chapter VII powers to support its acting as a "global legislator" inevitably raises the question of Council legitimacy, as it has done whenever the Council moves into uncharted territory.<sup>139</sup> In this instance, there is a central issue: whether it is appropriate for the Council, a small and unaccountable political body, whose decisions are immune from judicial review, to create far-reaching legal obligations for the entire international community.<sup>140</sup>

The speed and efficiency of this Council power clearly invites its continued use. The concern expressed by some, however, is that in addition to falling outside the Council's mandate, it disrupts the balance of power between the Council and the General Assembly as enshrined in the Charter and more gener-

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137. See Szasz, *supra* note 2, at 904. But see Happold, *supra* note 2, at 600 (asserting that the Council cannot legislate to prevent threats from arising).

138. See Anne-Marie Slaughter, *An American Vision of International Law*, 97 AM. SOC'Y INT'L L. PROC. 125, 128 (2003) (asserting that the United Nations "must adapt not only to changing power structures, but also to changing threats and values"); see also Andreas Paulus, *Realism and International Law: Two Optics in Need of Each Other*, 96 AM. SOC'Y INT'L L. PROC. 260, 272 (noting that the U.N. Charter "must be interpreted in a way that recognizes both the will of its drafters and changing realities").

139. See Jöst Delbrück, *Article 25, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 452, 453 (Bruno Simma et al. eds., 2d ed. 2002); see also Gill, *supra* note 45, at 36, 126; King, *supra* note 45, at 510.

140. See Lamb, *supra* note 44, at 363; see also Sohn, *supra* note 44, at 203. But see Frowein & Kirsch, *Introduction*, *supra* note 44, at 710 (arguing that while every U.N. organ must, in the first place, determine its own jurisdiction, "such a determination is binding only if supported by the Member States in general"); Rome U.N. Conference Report, *supra* note 4, at 14; Statement by Gunther Pleuger, Representative of Germany, to the United Nations, at the General Assembly on the reform of the Security Council, U.N. GAOR, 59th Sess., 26th mtg. at 17, U.N. Doc. A/59/PV.26 (2004), available at [http://germany-un.org/archive/speeches/2004/sp\\_10\\_12\\_04.html](http://germany-un.org/archive/speeches/2004/sp_10_12_04.html) (last visited Feb. 27, 2005) [hereinafter Statement by Ambassador Pleuger].

ally contravenes the traditional international law-making process, which is still based on the consent of States.<sup>141</sup> The Council's exercise of this power has been described as circumventing the "vehicle par excellence of community interest:" the multilateral treaty.<sup>142</sup> Under the traditional international law regime, rules of law are binding on States only when they have consented to be bound either through the negotiation and conclusion of a treaty or development of customary international law, which consists of State practice and *opinio juris*.<sup>143</sup> One could argue, however, that the requisite consent exists for the Council to act as a "global legislator." When U.N. Member States adhered to the Charter they expressly consented to a system in which the Council — fifteen States — acts on their behalf when carrying out its duty to maintain international peace and security. This implies their consent to each and every exercise of Council authority.<sup>144</sup> More to the point, on ratifying the Charter, all States expressly consented to a system where this small group of States, sitting as the Security Council, collectively assumes a formal law-making role via the adoption of binding resolutions.<sup>145</sup>

For some, however, this consent may be too attenuated to

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141. See Statements made by Representatives of a number U.N. Member States at the April 22, 2004 Security Council meeting to discuss a draft of what became Security Council Resolution 1540, U.N. SCOR, 59th Sess., 4950th mtg., U.N. Doc. S/PV.4950 (2004); see also Happold, *supra* note 2, at 607; Duncan Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for Retention of State Sovereignty*, 25 B.C. INT'L & COMP. L. REV. 235, 250 (2002) (noting that the "general consent of [S]tates creating rules of general application remains the operating principle of the international legal order").

142. Alvarez, *Hegemonic*, *supra* note 2, at 874; see also Lavalle, *supra* note 2, at 418. But see Szasz, *supra* note 2, at 901; Paulus, *Article 29*, *supra* note 54, at 553 (stating that although "one may doubt the competence of the Security Council to substitute Chapter VII measures . . . for the more burdensome avenue of treaty-making, this procedure may be justified by the special nature of the terrorist threat in the specific case concerned").

143. See Stephan Hobe, *The Era of Globalization as a Challenge to International Law*, 40 DUQ. L. REV. 655, 656 (2004).

144. U.N. CHARTER art. 24, ¶ 1.

145. See Michael Byers, *Thomas Franck's Recourse to Force: State Action Against Threats and Armed Attacks*, 97 AM. J. INT'L L. 721, 723 (2003) (book review); see also Statement by H.E. Ambassador Christian Wenaweser, Permanent Representative of the Principality of Liechtenstein, *supra* note 7 (stating that by electing non-permanent Members to the Security Council, the General Assembly has entrusted these ten States "with handling issues of international peace and security on their behalf and accepts the relevant decisions as legally binding").

be sufficient.<sup>146</sup> Instead, it is argued, every affected State should have the right to take part in the negotiation of any measure that creates a binding legal norm.<sup>147</sup> It is the General Assembly's role to fill gaps in existing international law through the negotiation and conclusion of a treaty.<sup>148</sup> Such gaps should not be filled by the imposition of Security Council measures, which are viewed by some as unbalanced and selective, as they tend to represent the views of the most powerful members of the already unrepresentative political body.<sup>149</sup>

Leaving it to the General Assembly to agree upon global norms to address urgent and global threats — while perhaps appealing in theory and more consistent with the Westphalian conception of the international system — would, however, significantly impede the United Nation's and particularly, the Security Council's ability to deal effectively with the critical threats of the twenty-first century. With 191 Member States, often representing different economic and political perspectives, generally eligible to participate, the traditional treaty-making process in the General Assembly has become a time-consuming and cumbersome one.<sup>150</sup> The prevailing practice of seeking consensus or

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146. See Alvarez, *War on Terrorism*, *supra* note 11, at 120.

147. See Harper, *supra* note 51, at 151.

148. See U.N. CHARTER art. 13, ¶ 1. Article 13(1) of the Charter provides that "[t]he General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification." *Id.*

149. See, e.g., Statement by Representative of Cuba, U.N. SCOR, 59th Sess., 4956th mtg. at 30, U.N. Doc. S/PV.4950 (2004); Statement by Vijay Nambiar, Representative of India, *supra* note 5, at 23; Statement by Representative of Indonesia, *supra* note 5, at 31; Statement by Representative of Namibia, *supra* note 5, at 17; Statement by Representative of Nepal, *supra* note 5, at 14; Statement by Representative of South Africa, *supra* note 5, at 21.

150. See Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1, 7 (1994); see also John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 795 (2003). Jackson questions the legitimacy of the one-Nation, one-vote system, where a

mini-[S]tate of less than fifty thousand people should carry the same weight in a voting structure as giant governments and societies that have more than one hundred million constituents each? Does giving each mini-[S]tate such weight accentuate the possibilities of "hold-out" bargaining, what some call "ransom"? Is it fair that a voting majority of U.N. members today could theoretically encompass less than 5 percent of the world's population?

Jackson, *supra*, at 795. See Zacklin, *supra* note 100, at 362 (explaining the practical disadvantages of embarking on a traditional treaty-making exercise when faced with the need to fill a pressing legal gap).

near-unanimity to adopt a convention has not only led to drawn-out negotiations, but also to highly ambiguous or empty provisions, undermining what is needed to ensure the establishment of an effective international legal regime.<sup>151</sup> The ten-year conference on the Law of the Sea, the frustrations at the 1992 Rio Conference on the Environment, and the stalled negotiations of the comprehensive terrorism convention and the nuclear terrorism convention, where no progress has been made in the last seven negotiating sessions spanning more than three years, are just a few examples.<sup>152</sup>

Part of the reason why the Security Council had to adopt Resolution 1373 was because the traditional law-making process in the General Assembly was not working.<sup>153</sup> For example, negotiations on a comprehensive terrorism convention have been stalled for four years over two paragraphs in the text related to the definition of terrorism.<sup>154</sup> Although there was consensus on

151. See Schachter, *supra* note 56, at 4.

152. See United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397; U.N. Conference on the Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/Conf.151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 874 (1992); *see also* Draft Comprehensive Convention on International Terrorism, U.N. GAOR, 6th Comm., 55th Sess., Agenda Item 166, U.N. Doc. A/C.6/55/1 (2000), Draft Convention on the Suppression of Acts of Nuclear Terrorism, Jan. 28, 1997, U.N. Doc. A/AC.252/L.3 (1997); International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Res. 44/34, U.N. GAOR, 44th Sess., Supp. No. 49, Annex, U.N. Doc. A/44/49 (1989), *reprinted in* 29 I.L.M. 89, 91 (1990). The Convention took nine years to negotiate and still has not received the necessary 22 instruments of ratification or accession for it to enter into force. *See id.* art. 19, ¶ 1. Only 16 States signed the treaty and, as of November 1, 2004, only 19 are parties.

153. It is worth noting that during the Cold War, when the Council was paralyzed and thus unable to act on most issues, including the use of force, the General Assembly stepped into the gap. During this period it passed its well-known "law making" resolutions on issues related to the use of force. These included the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (G.A. Res. 2625) and the 1974 Definition of Aggression (G.A. Res. 3314). *See* G.A. Res. 2625, U.N. GAOR, 25th Sess., 1883rd mtg. at 121, U.N. Doc. A/8082 (1970); G.A. Res. 3314, U.N. GAOR, 29th Sess., 2319th mtg. at 142-43, U.N. Doc. (1974). According to Rosalyn Higgins, "[t]hese Declarations reflected a determination by the Assembly to act, notwithstanding the freeze in the Security Council." Higgins, *supra* note 135, at 447.

154. The two major outstanding issues are both political, rather than legal in nature and center around Articles 18 and 2 of the draft text. The first is a proposed exclusion from the scope of the convention for the activities of armed forces in an armed conflict and of State military forces in the conduct of their official duties. The second is the demand by the Organization of the Islamic Conference ("OIC") (consisting of fifty-five countries) for inclusion of language that would legitimize activities of

the remaining parts, the text could not be adopted until agreement was reached on all provisions. Even where the General Assembly had reached consensus on the text of a counter-terrorism treaty, States, particularly in the regions where the terrorist threat is probably greatest, were slow to take the necessary domestic steps to become parties to (*i.e.*, be legally bound by) them, thus limiting their practical relevance. For example, few States were parties to the two most recently adopted international terrorism conventions, with one of them (the Terrorist Financing Convention), not yet in force.<sup>155</sup> In fact, only two States were party to all twelve of the international conventions and protocols related to terrorism.<sup>156</sup> Moreover, there was no mechanism in place to monitor the efforts of States to join and implement these treaties. Thus, even where States had consented to be bound by the obligations contained in the treaties, the United Nations had limited means to politically pressure them to actually implement such obligations. In sum, the traditional law-making approach was proving inadequate for dealing with the global and imminent terrorist threat. The Security Council, therefore, may have had little choice but to try to fill the void.

With the Council confronted on one side by these new threats and on the other by the limitations of the consent-based international law-making tradition, one is reminiscent of Louis Henkin's statement a decade ago:

[P]roblems looming for mankind at the turn of the century cry for regulation but the laws of law-making render regulation difficult to achieve . . . . The international system remains essentially "liberal", but some movement towards the welfare [S]tate might be irresistible . . . . Should we be thinking of changing the laws of law-making — as in fact the world did in

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national liberation movements and "peoples struggling against foreign occupation." See Office of Legal Affairs, *Ad Hoc* Committee established by General Assembly Resolution 51/210 of 17 December 1996, available at <http://www.un.org/law/terrorism/index.html> (providing a summary of the recent debates on this subject in the *Ad Hoc* Committee.); see also Oothuizen & Wilmshurst, *supra* note 27.

155. On September 28, 2001, four States were party to the 1999 Terrorist Financing Convention. See Terrorist Financing Convention, *supra* note 33. Twenty-eight were party to the 1997 Terrorist Bombings Convention. See Terrorist Bombings Convention, *supra* note 33.

156. Two States (Botswana and the United Kingdom) were party to all 12 international conventions and protocols related to terrorism. See *supra* note 33 and accompanying text.

1945 when it established the U.N. Security Council?<sup>157</sup>

It appears that the Security Council, through the adoption of Resolutions 1373 and 1540, has provided at least a partial answer to Professor Henkin's question: in certain circumstances, perhaps recognizing the limitations of the "laws of law-making," the Council will need to make innovative use of its Chapter VII authority to establish global norms to address certain problems of the new century.<sup>158</sup>

### V. POSSIBLE SAFEGUARDS

Expansion of Security Council membership to make it more representative and reflective of current political realities will help allay legitimacy concerns, such as those described above, when the Council chooses to act as a "global legislator."<sup>159</sup> Any such expansion, however, will likely take a number of years. Meanwhile, given the urgent and global nature of the twenty-first century threat, the speed and efficiency with which the Council, as compared with the General Assembly and other more representative bodies, can act will no doubt tempt Council members to continue using the "global legislation" tool as one means to address these threats. The concern that the Council might abuse this authority and regularly usurp the role of the General Assembly<sup>160</sup> may be misplaced. Because this process circumvents the traditional treaty-making process for all U.N. Members, in-

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157. See Louis Henkin, *Notes from the President*, AM. SOC'Y INT'L L. NEWSL., (Am. Soc'y Int'l L., Washington, D.C., Jan. 1994); see also Mariano-Florentino Cuellar, *Reflections on Sovereignty and Collective Security*, 40 STAN. J. INT'L L. 211, 215 (2004) (stressing the importance of recognizing the limitations of both the U.N. framework and the sovereignty-centered approach it represents).

158. See Szasz, *supra* note 2, at 905 (noting that if this Security Council authority is used prudently, it will enhance the U.N. and benefit the international community, "whose ability to create international law through traditional processes has lagged behind the urgent requirements of the new millennium").

159. See Delbrück, *supra* note 139, at 452. The German Permanent Representative to the United Nations recently said that if the Council was going to continue to "set[ ] rules for the UN-membership as a whole," as it has done with S.C. Resolutions 1373 and 1540, "it is essential to change the structure of the [Security C]ouncil of 1945." Statement by Ambassador Pleuger, Representative of Germany, *supra* note 140, at 18. The Security Council, he continued, "needs, especially when legislating, more legitimacy through better representativeness." *Id.*

160. See, e.g., Lamb, *supra* note 44, at 388 (writing that the Council's "open-textured and discretionary powers could be inherently subject to abuse, with profound consequences for the fundamental rights of [S]tates and individuals bearing the brunt of such measures").



cluding the P5, it bypasses the role allocated to domestic legislatures in national systems. Therefore, since each Council Member will need to tread carefully so as not to offend its legislative branch, the Council is likely to use this power sparingly.

When the Council chooses to act as a "global legislator," it must nevertheless be careful to protect its institutional legitimacy by exercising this broad power in ways that most States deem appropriate and within its competence.<sup>161</sup> It must also have safeguards in place to prevent this power from being abused and to help ensure broad Member State cooperation and compliance. Both Resolution 1373 and Resolution 1540 offer some lessons in this regard that could serve as a guide for future Council use of its "global legislating" function.

First, the Council should only exercise this power on an exceptional basis to address a new and urgent threat not addressed by existing treaty regimes. In both resolutions 1373 and 1540, the Council was seeking to address gaps in the international law regimes pertaining to counter-terrorism and counter-proliferation — both recognized urgent threats.<sup>162</sup> With respect to Resolution 1373, as has already been stated, a web of international conventions and protocols related to terrorism existed.<sup>163</sup> As previously noted, however, on the day Resolution 1373 was adopted only two States were parties to all of them and most of the instruments had fewer than one-hundred States parties.<sup>164</sup> The recently concluded Terrorist Financing Convention had only four parties, eighteen fewer than needed to bring the convention into force.<sup>165</sup> In fact, the convention would not enter

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161. See Rome U.N. Conference Report, *supra* note 4, at 13-14; see also Alvarez, *Hegemonic*, *supra* note 2, at 888; Hapgood, *supra* note 2, at 609 (arguing that, absent certain safeguards, which would essentially give the General Assembly a veto over Security Council action in this area, the Council would be usurping the powers of States to legislate for themselves); Harper, *supra* note 51, at 105.

162. Even those who questioned the Council's authority to fill the gaps agreed that the gaps existed. See, e.g., Statement by Vijay Nambiar, Representative of India, *supra* note 5; Statement by Representative of Indonesia, *supra* note 149; Statement by Representative of Namibia, *supra* note 149; Statement by Representative of Nepal, *supra* note 149; and Statement by Representative of South Africa, *supra* note 149.

163. See *supra* note 33.

164. See United Nations Treaty Collection, available at <http://untreaty.un.org/English/Terrorism.asp> (last visited Feb. 27, 2005). On September 28, 2001, only Botswana and the United Kingdom were parties to all twelve of the treaties and only five of the twelve had more than 100 States parties.

165. See Terrorist Financing Convention, *supra* note 33. As of September 28, 2001,

into force until April 10, 2002, some three and a half years after the General Assembly began negotiating the text.<sup>166</sup> The General Assembly's Sixth Committee was also in the midst of negotiating two additional counter-terrorism treaties, which were (and remain) stalled.<sup>167</sup> There is no indication of when these negotiations might conclude. In short, a glaring gap existed in the international law framework to combat terrorism.

With respect to 1540, there were already a number of existing non-proliferation treaties, which had broad participation from the vast majority of States. The Council felt, however, that none of them adequately addressed the specific challenge facing the United Nations, namely preventing terrorists and terrorist organizations from obtaining weapons of mass destruction.<sup>168</sup>

On two occasions prior to September 11th, the Council confronted an international law gap during its efforts to carry out its mandate. The first instance, which has been discussed above, led to the creation of the ICTY and the adoption of the court's statute.<sup>169</sup> As noted above, the Council chose to use its Chapter VII authority and forego the traditional international law-making approach in order to respond rapidly to the urgent threat to the peace.<sup>170</sup> Around that same time, following the spate of attacks on U.N. personnel, it was initially suggested that the Security Council declare such acts to be international crimes and require all States to prosecute or extradite those who commit them. The Council, however, decided to forego the "global legislation" route, leaving it instead for the General Assembly's Le-

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Botswana, Sri Lanka, the United Kingdom, and Uzbekistan were parties to the convention.

166. On December 8, 1998, the General Assembly empowered the *Ad Hoc* Committee to elaborate a draft of an international convention for the suppression of the financing of terrorism. See G.A. Res 53/108, U.N. GAOR, 53rd Sess. 83rd plenary mtg., at 3, U.N. Doc. A/53/108 1999.

167. See OOSTHUIZEN & WILMSHURST, *supra* note 27.

168. As of September 2004, there were some 189 parties to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons; 151 parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction; and 164 to the 1993 Convention on the Prohibition of the Development, Production, and Stockpiling and Use of Chemical Weapons and on their Destruction. See OOSTHUIZEN & WILMSHURST, *supra* note 27, at 6 n.3; see also Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 48, 3729 U.N.T.S. 161; Biological Weapons Convention, *supra* note 36; Chemical Weapons Convention, *supra* note 36.

169. See *supra* notes 90-91 and accompanying text.

170. See *supra* notes 90-92 and accompanying text.

gal Committee to negotiate and adopt what became the U.N. Convention on the Safety of U.N. and Associated Personnel.<sup>171</sup> Although it is not clear why the Council chose not to act here, it seems that the threat was not of such an imminent and global nature to justify Council action. By deferring to the General Assembly, the Council gave due respect to the traditional law-making approach. The result, however, is that ten years after the Convention was adopted, fewer than half of the U.N. Member States are party to the treaty and none of the States parties is a "host-States," *i.e.*, a State host to a U.N. operation covered by the Convention.<sup>172</sup> Thus, those States whose adhesion is needed to make the treaty truly effective are not parties to it.

Second, the Council should make every reasonable effort to ensure that the obligations it imposes on States generally reflect the will of the international community.<sup>173</sup> Resolutions imposing such obligations should be adopted by consensus, as were both 1373 and 1540, and following some consultation with a broad range of non-Council Members, as only 1540 was. The Council's failure to consult broadly prior to the adoption of Resolution 1373 was mitigated by the fact that it drew on provisions of treaties that had been adopted by consensus. Admittedly, however, these treaties did not yet have universal participation.

In drafting Resolution 1373, the Council took certain provisions from the Terrorist Financing Convention and from other conventions related to terrorism, and made them binding on all States overnight in order to fill the existing gap.<sup>174</sup> While no single convention from which the Council borrowed had universal participation, all of them were adopted by consensus either in the General Assembly or in one of the U.N. specialized agencies. Moreover, the Council avoided addressing those issues on which there was no consensus among the wider U.N. Membership. For example, it took care not to interfere with the ongoing General Assembly efforts to define terrorism, and thus Resolu-

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171. See Wood, *supra* note 72, at 78.

172. See *Report of the Secretary-General: Scope of Legal Protection Under the Convention on the Safety of United Nations and Associated Personnel*, U.N. GAOR, 59th Sess., Agenda Item 152, at 3, U.N. Doc. A/59/226 (2004). As of August 2004, 71 States were party to the Convention. See *id.*

173. See, *e.g.*, Rome U.N. Conference Report, *supra* note 4, at 13; Alvarez, *Hegemonic*, *supra* note 2, at 888; Szasz, *supra* note 2, at 905.

174. See S.C. Res. 1373, *supra* note 3.

tion 1373 allows each State to apply its own definition.<sup>175</sup>

Notably, one of the positive results of Resolution 1373 is the marked increase in ratifications and accessions to these treaties.<sup>176</sup> This increase is largely due to the technical assistance that the Counter-Terrorism Committee ("CTC") and other international and regional bodies have made available to States. Such support assists States with drafting the often complex, but necessary, legislation to join treaties and then implement them in their domestic systems.<sup>177</sup> For many States it therefore appears that lack of capacity rather than lack of political will or agreement with the principles contained in the treaties was the reason for failing to become parties to them.

Although Resolution 1540 does not draw upon provisions of existing treaties, the Council sought to ensure that the obligations imposed by Resolution 1540 reflected the will of the international community. The Council engaged in lengthy negotiations within the Council, consulted with regional groups, and held a public meeting of the Security Council to hear comments from the wider U.N. Membership on a draft text.<sup>178</sup> While many criticized the legislative role of the Council during the public Security Council meeting held six days prior to the adoption of the Resolution, no one criticized the substance of the actual measures the Council was seeking to impose on States.<sup>179</sup> The

175. The principal reason the Security Council did not attempt to define terrorism was to avoid the divisive debate that has bogged down the General Assembly Sixth Committee's work on the draft comprehensive convention on international terrorism. The sponsors of Security Resolution 1373 wanted a resolution that would pass quickly. One commentator has gone so far as to say that the resolution "was possible *only because* member [S]tates did not have to tackle the issue of terrorism. . . . Many [S]tates among those voting for the resolution did not see eye to eye with the United States on such a definition." Shibley Telhami, *Conflicting Views of Terrorism*, 35 CORNELL INT'L L. J. 581, 584 (2002) (emphasis added).

176. See FOURTH FREEDOM FORUM REPORT, *supra* note 30, at 6 (noting that between September 2001 and May 2004, the Terrorist Bombings Convention has seen the number of States parties increase from 28 to 115 and the Terrorism Financing Convention has seen an increase from 5 to 107; in addition, those conventions that address specific areas of terrorist activity have had a 20-40% increase in ratification rates since the adoption of S.C. Resolution 1373).

177. See FOURTH FREEDOM FORUM REPORT, *supra* note 30, at 11-13.

178. See U.N. SCOR, 59th Sess., 4956th mtg. at 14, U.N. Doc. S/PV.4950 (2004) (public meeting of the Security Council on April 22, 2004 at which all 15 Council and more than 30 non-Council Members voiced their views on a draft of what became S.C. Resolution 1540); see also Lavalle, *supra* note 2, at 425; OOSTHUIZEN & WILMSHURST, *supra* note 27 at 3.

179. See U.N. SCOR, 59th Sess., 4956th mtg., U.N. Doc. S/PV.4950 (2004).

Council's legitimacy will be jeopardized if the measures it seeks to impose are seen as solely reflecting the views of the P5, or worse, just the single "hegemon."<sup>180</sup>

Third, the Council should establish a committee to work cooperatively with States to implement the "global legislation." Creating a non-threatening body to work with each country will serve as the carrot to offset the stick of the Chapter VII measures and will soften their impact. This approach has been a key to the success of Resolution 1373 and the CTC, which has received unprecedented levels of cooperation from States.<sup>181</sup> When the Council adopted Resolution 1373 and established the CTC to monitor States' implementation of the provisions therein, it offered little guidance on how the committee should operate and what role it should play in the efforts to combat terrorism. While the Council wanted all States to do more domestically to combat terrorism, it did not envisage the CTC becoming the extraordinary capacity-building instrument that it has become.<sup>182</sup>

As a result of this approach, all States have cooperated with the committee to one degree or another and none has criticized the measures imposed under Resolution 1373 as being illegitimate. Largely as a result of the CTC's success in getting States to take the necessary steps to begin implementing Resolution 1373, the Council chose to adopt the same approach in Resolution 1540, when it created the 1540 Committee.<sup>183</sup>

Fourth, in imposing global norms, the Council should allow States broad discretion to implement them in ways that are con-

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180. See Rome U.N. Conference Report, *supra* note 4, at 14; see also Alvarez, *Hegemonic*, *supra* note 2, at 888 (noting that the "Security Council would be well-advised to be sure that what it does reflects the will of the international community as a whole, including [S]tates not represented on the Council and members of international civil society.").

181. Hoping to replicate this success, the Council established a similar committee to monitor the implementation of S.C. Resolution 1540. See S.C. Res. 1540, *supra* note 3, ¶ 6.

182. See Rosand, *Security Council Resolution 1373*, *supra* note 25, at 335. The way the CTC operates (transparently, through dialogue, and by consensus), the role it plays (seeking to establish a dialogue between the Council and each State on how best to build its capacity against terrorism), and its focus on developing relationships with international, regional, and sub-regional organizations, and on the facilitation of technical assistance to needy States, have been shaped by both the Council, and the CTC itself, largely based on the direction provided by Sir Jeremy Greenstock, the CTC's first chairman. See Rosand, *Cornerstone of the United Nations*, *supra* note 30, at 615-17 (discussing the CTC's accomplishments).

183. See *supra* note 181.

sistent with their domestic legal systems. This approach will make these Chapter VII measures seem more like goals or standards rather than rigid legislative requirements.

This strategy was used in both Resolution 1373 and Resolution 1540. For example, operative Paragraph 1(b), which requires States to have a law in place that criminalizes the financing of terrorism, is the only one of the eleven binding paragraphs in Resolution 1373 that actually requires specific action from States.<sup>184</sup> The remaining ten impose obligations that allow States considerable flexibility in choosing the means for implementing them. For example, Paragraph 2(b) requires States to "take the necessary steps to prevent the commission of terrorist acts"<sup>185</sup> and 2(d) requires them to "deny safe haven" to terrorists and their supporters.<sup>186</sup> Here the Council is setting forth the goals, but leaving it to the States to decide how to reach them. Moreover, rather than imposing a specific template on States concerning how to implement the requirements under Resolution 1373, the CTC is relying on the best practices, codes, and standards in the specific substantive areas of the resolution developed by broadly representative international organizations such as the International Civil Aviation Organization and the World Customs Organizations.<sup>187</sup>

The Council followed this same approach in Resolution 1540. For example, the resolution requires that States "adopt and enforce *appropriate effective*" laws, "*in accordance with their national procedures*,"<sup>188</sup> which will prevent terrorists from acquiring weapons of mass destruction and their means of delivery and that States "develop and maintain *appropriate effective measures*"

184. See S.C. Res. 1373, *supra* note 3, ¶ 1(b).

185. See *id.* ¶ 2(b).

186. See *id.* ¶ 2(d).

187. See S.C. Res. 1566, U.N. SCOR, 59th Sess., 5053d mtg., at 7, U.N. Doc. S/1566 (2004) (requesting "the CTC in consultation with relevant international, regional and sub-regional organizations and the U.N. bodies to develop a set of best practices to assist States in implementing the provisions of Resolution 1373 (2001) related to the financing of terrorism"); see also FOURTH FREEDOM FORUM REPORT, *supra* note 30, at 10 (noting that the CTC has borrowed from other international agencies in establishing standards for assessing State capacity); Rosand, *Cornerstone of the United Nations*, *supra* note 30, at 618. But see Serge Schmemann, *United Nations to Get a U.S. Antiterror Guide*, N.Y. TIMES, Dec. 19, 2001, at B4 (reporting that the U.S. Resolution 1373 report to the Council, indicating a broad range of actions taken under the U.S. PATRIOT Act was intended as a "template for other countries in adapting their own laws").

188. S.C. Res. 1540, *supra* note 3, at 2 (emphasis added).

in the areas of export controls, border controls, and physical protection of nuclear, chemical and biological materials.<sup>189</sup>

During the debates surrounding the adoption of Resolution 1540, perhaps anticipating some of the criticism that would be leveled against the Council for acting as a "global legislator," a number of Council Members cited the flexibility the Council was allowing States to implement the provisions of the resolution. For example, the Spanish Ambassador said that the resolution "was not intrusive as it gives States leeway on how to internally interpret its implementation."<sup>190</sup> The French Ambassador added that the Council was simply "establishing the goals, but leaving each State free to define the penalties, legal regulations, and practical measures to be adopted" to fulfill them.<sup>191</sup> Pakistan made it clear that the flexibility the Council allowed States in implementing the resolution was part of the reason that it could join other Council Members in supporting the text.<sup>192</sup>

Fifth, although the Council failed to do this in both 1373 and 1540, in any future attempts at "global legislation" it should consider highlighting both the emergency nature of the Council-imposed measures and recognition that such measures may be more appropriately addressed in a multilateral treaty negotiation, *i.e.*, via the traditional law-making process. Practically, this goal could be achieved by including language in the resolution that provides for regular (*e.g.*, yearly) Council review of the measures to ensure that they are still needed and that a decision to terminate the measures would not be subject to the veto.<sup>193</sup> This review could be coupled with a call on the General Assembly or another more representative body to begin new or to finalize ongoing negotiations of a multilateral treaty addressing the issues the Council was forced to address on an emergency basis. Once such an instrument entered into force, the Council would then come under great pressure to terminate its measures, if it

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189. S.C. Res. 1540, *supra* note 3, at 2-3 (emphasis added).

190. Statement by Mr. Arias, Representative of Spain, to the United Nations, U.N. SCOR, 59th Sess., 4950th mtg. at 7, U.N. Doc. S/PV.4950 (2004).

191. Statement by Jean-Marc de La Sabliere, Representative of France, to the United Nations, U.N. SCOR, 59th Sess., 4950th mtg. at 8, U.N. Doc. S/PV.4950 (2004).

192. Statement by Munir Akram, Representative of Pakistan, to the United Nations, U.N. SCOR, 59th Sess., 4950th mtg. at 15, U.N. Doc. S/PV.4950 (2004).

193. See Rome U.N. Conference Report, *supra* note 4, at 14 (emphasizing the importance that the Security Council clarify that its "legislative" actions are "emergency regulations" directed at an immediate threat to peace and security.).

had not already done so, as there would no longer be an international law gap that needed filling.<sup>194</sup>

This parallel approach was advocated not only by a number of U.N. Members surrounding the adoption of Resolution 1540, but also some eleven years earlier by Council Members upon the establishment of the ICTY. While supporting the creation of an *ad hoc* tribunal to deal with the exceptional circumstances, Council Members urged that work continue on establishing, through the adoption of a multilateral treaty, a permanent international criminal court.<sup>195</sup> Highlighting some of the pitfalls of the traditional international law-making process, it took another five years to conclude such a treaty and an additional four years before it entered into force.<sup>196</sup> Nevertheless, with a permanent international criminal court now established, there is no international law gap for the Council to fill in this area, and thus the Council is unlikely to establish another *ad hoc* tribunal.

Finally, the Council should be sensitive to the concern in the U.N. community that it may be exceeding its mandate by adopting a Chapter VII resolution imposing "global legislation" on the entire U.N. Membership. One fear would be that the Council would then adopt Chapter VII enforcement measures, including ultimately the authorization of the use of force, against States that fail to implement the measures contained therein. To help assuage this fear, the Council should make it clear in the underlying resolution that any enforcement action taken against non-compliers would require a second resolution.

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194. See Statement by Ndekhedehe Effiong Ndekjedehe, Permanent Representative of Nigeria, *supra* note 5 (stating that unless the Council stipulates that these are emergency regulations to address an imminent threat, perhaps of a time-limited duration until more legally founded instruments of law can be negotiated or come into force, the Security Council's legitimacy and authority will almost certainly come under increasing attacks).

195. See, e.g., Statement by Juan Yanez-Barnuevo, Representative of Spain, *supra* note 106, at 7; Statement by Sir David Hannay, Representatives of United Kingdom, *supra* note 102, at 17; Statement by Representatives of Venezuela, *supra* note 102, at 41.

196. The Rome Statute of the International Criminal Court was signed in Rome on July 17, 1998, and entered into force on July 1, 2002. See Rome Statute on the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF/189/9, *reprinted in* 37 I.L.M. 999 (1998); see also International Criminal Court, Historical Introduction, available at <http://www.icc-cpi.int/ata glance/whatistheicc/history.html> (last visited Feb. 27, 2005) (describing the history and establishment of the International Criminal Court).



From the evolution that took place from Resolution 1373 to Resolution 1540, it appears that the Council has already been sensitized to this concern.

In Resolution 1373 the Council determined to "take all necessary steps" to ensure its full implementation. These are buzz words for using all available means under Chapter VII, including force, with a subsequent Council resolution not necessarily required.<sup>197</sup> Thus, the Council explicitly stated its readiness to take steps to deal with those States that are failing to comply with the Resolution. Including such language in a resolution of this sort, which depends on broad cooperation from States in order to be effective, could result in having the opposite effect.<sup>198</sup>

Resolution 1540, on the other hand, makes it explicit that any enforcement action against non-compliers would require another Council resolution.<sup>199</sup> Moreover, during the Council's public meeting to discuss a draft of the resolution and the meeting following its adoption, a number of Council Members reassured the broader U.N. Membership that the Resolution was not about enforcement. Any enforcement, they emphasized, would require another Council decision.<sup>200</sup>

### CONCLUSION

The U.N. Charter was drafted, and the United Nations has

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197. See, e.g., S.C. Res. 678, *supra* note 1, at 2 (authorizing member States to use "all necessary means" to implement Resolution 660); S.C. Res. 1368, U.N. SCOR, 4370th mtg. at 5, U.N. Doc. S/1368 (2001) (expressing the Council's readiness to "take all necessary steps" to respond to the September 11, 2001 attacks).

198. See OOSTHUIZEN & WILMSHURST, *supra* note 27, at 4 (also stating that "a legitimate fear arises when one sees the draft resolution under Chapter VII, with language such as that used — 'to combat by all means' — an authorization is being sought which could justify coercive actions envisaged in Articles 41 and 42 of the Charter, including the use of force.").

199. See S.C. Res. 1540, *supra* note 3, ¶ 11 (noting the Council "*Expresses* its intention to monitor closely the implementation of this resolution and, at the appropriate level, to take further decisions which may be required to this end."); see also Laval, *supra* note 2, at 419 (stating that Resolution 1540 "nowhere refers, even implicitly, to the taking of any kind of action against states not complying with it").

200. See, e.g., Statement by Adam Thomson, Deputy Permanent Representative of the United Kingdom, to the United Nations, U.N. SCOR, 59th Sess., 4950th mtg. at 11, U.N. Doc. S/PV.4950 (2004) (stating that any enforcement action would require a new Council action); Statement by James Cunningham, Deputy Permanent Representative of the United States, to the United Nations, U.N. SCOR, 59th Sess., 4950th mtg. at 17, U.N. Doc. S/PV.4950 (2004) (stating that "the draft resolution is not about enforcement.").

lived much of its life, in a world where States were the major threat to peace, in large part because they controlled the weapons that could threaten international peace and security. As the last few years have made clear, this is no longer the case. Today, the greatest threats are posed by non-State terrorists and terrorist groups and the risk that they might come to possess WMD. The challenge for the U.N. system, and the Security Council in particular, given its primary responsibility for maintaining international peace and security, has been and remains, to find ways to address such threats in a sovereignty-centered system.<sup>201</sup> Rather than being able to address non-State actors directly, the Security Council must rely on the cooperation of States to implement its measures within their respective jurisdictions against the relevant individuals, entities, and groups. Therefore, in order to be able to target terrorists and terrorist organizations effectively, the Council had to adopt a series of detailed measures through the intermediary of State action.<sup>202</sup> The alternative was

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201. Prior to September 2001, the Council did adopt measures to address threats posed by non-State actors, generally as part of its effort to address civil wars or other intra-State conflicts. On a number of occasions, the Council imposed economic or military sanctions against non-State entities. *See, e.g.*, S.C. Res. 253, U.N. SCOR, 23d Sess., 1428th mtg. at 5-7, U.N. Doc. S/INF/23/Rev.1 (1968), *reprinted in* 7 I.L.M. 897 (1968) (regarding Southern Rhodesia); S.C. Res. 733, U.N. SCOR, 46th Sess., 3039th mtg., U.N. Doc. S/RES/733 (1992); S.C. Res. 794, U.N. SCOR, 46th Sess., 3145 mtg., U.N. Doc. S/RES/794 (1992) (regarding Somalia); S.C. Res. 788, U.N. SCOR, 49th Sess., 3138th mtg., U.N. Doc. S/RES/788 (1992) (regarding Liberia); S.C. Res. 1132, U.N. SCOR, 51st Sess., 3822 mtg., U.N. Doc. S/RES/1132 (1997); and S.C. Res. 1306, U.N. SCOR, 55th Sess., 4168mtg, U.N. Doc. S/RES/1306 (2000) (regarding Sierra Leone). In these cases, however, the Council imposed obligations (to implement the measures) only on U.N. Member States. The Council has imposed obligations on non-State entities in the context of addressing all of the parties to an internal armed conflict. Thus, for example, during the 1990s it demanded that the Bosnian Serbs (who were not representing a recognized government or State) accept a proposal for territorial settlement to resolve the conflict in the former Yugoslavia. *See* S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/770 (1992); *see also* S.C. Res. 942, U.N. SCOR, 49th Sess., 3428th mtg, U.N. Doc. S/RES/942 (1994). Similarly, the Council imposed similar obligations against the *União Nacional Para a Independência Total de Angola* ("UNITA") in an effort to resolve the Angolan conflict, against the Taliban and members of al Qaeda, and against the different factions in the conflict in the Democratic Republic of the Congo. *See* S.C. Res. 1127, U.N. SCOR, 52nd Sess., 3814th mtg., U.N. Doc. S/RES/1127 (1997); *see also* S.C. Res. 1173, U.N. SCOR, 53rd Sess., 3891st mtg., U.N. Doc. S/RES/1173 (1998); S.C. Res. 1295, U.N. SCOR, 55th Sess., 4129th mtg., U.N. Doc. S/RES/1295 (2000) (addressing UNITA); S.C. Res. 1267 (Oct. 15, 1999); S.C. Res. 1333; U.N. SCOR, 55th Sess., 4251st mtg., U.N. Doc. S/RES/1333 (2000); S.C. Res. 1355, U.N. SCOR, 4329th mtg, U.N. Doc. S/RES/1355 (2001).

202. The Security Council has targeted individuals, groups, and entities directly, by establishing Council committees to designate and maintain lists of such non-State ac-

to have merely urged or demanded all States to do more to combat terrorism, without establishing any global standards or norms for States to meet. In both Resolution 1373 and 1540, the Council chose the more ambitious route, requiring States to take a number of detailed steps within their jurisdictions to address the terrorist threat and it established a committee to work with States to monitor the implementation of measures. Although both Resolutions allow States considerable discretion in implementing the various measures, the Council has nevertheless provided States with a detailed prescription for how to combat terrorism and prevent terrorists from getting their hands on WMD. In the end, however, it is up to the States to take the necessary action within their jurisdictions.

The question of whether the Council has the authority to act as a "global legislator" is not simply a theoretical one. Rather, there would be serious practical consequences, including to the credibility of the United Nations, if this Council action were to be viewed by most observers as illegitimate or, worse, illegal. Although this result could not prevent the Council from engaging in such action, it would likely reduce the level of cooperation the Security Council received from States in implementing its "global legislative" measures. Without such cooperation, the Council-imposed measures become hollow and the Council would be less likely to use this tool in the future. Such a result is neither in the interest of the United Nations nor its Member States, as the Council needs to be able to use this instrument effectively in order to address adequately the global, non-State

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tors, and by requiring all States to implement a series of sanctions (e.g., asset freeze, travel ban, and/or arms embargo) against those on such lists. *See, e.g.*, S.C. Res. 1343, U.N. SCOR, 56th Sess., 4287th mtg, U.N. Doc. S/RES/1343 (2001) (establishing the Liberia Sanctions Committee (which was terminated in Resolution 1521 (Dec. 22, 2003)), charging it with, *inter alia*, designating the individuals subject to the sanctions imposed by the Resolution); S.C. Res. 1132; U.N. SCOR, 51st Sess., 3822 mtg. at 4, U.N. Doc. S/RES/1132 (1997) (establishing Sierra Leone Sanctions Committee and charging it with, *inter alia*, "designat[ing] expeditiously members of the military *junta* and adult members of their families whose entry or transit is to be prevented . . ."); S.C. Res. 1127, U.N. SCOR, 52nd Sess., 3814th mtg., U.N. Doc. S/RES/1127 (1997) (requesting the Angola Sanctions Committee to oversee designation of officials and adult members of their immediate families who entry or transit is to be prevented and whose travel documents, visas or residence permits are to be suspended or cancelled.). As Frowein and Kirsch have correctly pointed out, however, the Council is not addressing these non-State actors directly. Rather, it is "subject[ing] them to enforcement measures through the intermediary of State action." Frowein & Kirsch, *Introduction, supra* note 44, at 716.

threats of the new century.<sup>203</sup>

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203. See, e.g., Press Release, United Nations, Statement by Ambassador John Danforth, US Representative to the United Nations, on the Situation in the Middle East, to the General Assembly, July 16, 2004, *available at* [http://www.un.int/usa/04print\\_130.htm](http://www.un.int/usa/04print_130.htm) (stating that if the ICJ's interpretation of Article 51 was sustained, "then the United Nations Charter could be irrelevant in a time when the major threats to peace are not from [S]tates, but from terrorists").