

# Greening the Security Council: Climate Change as an Emerging ‘Threat to International Peace and Security’

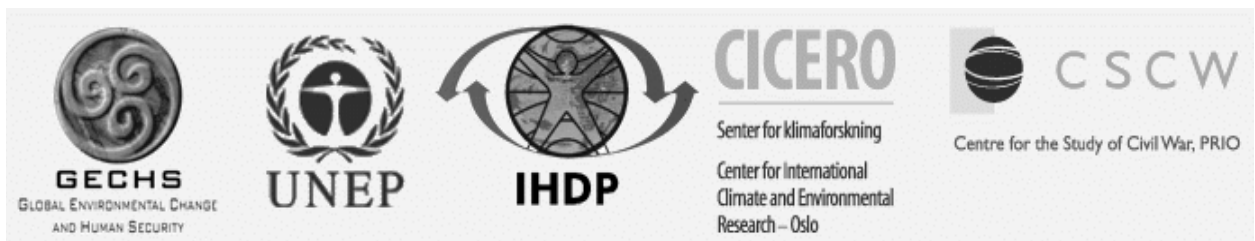
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## Human Security and Climate Change

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As we look ahead, we can see real risks that resource depletion, especially freshwater scarcities, as well as severe forms of environmental degradation, may increase social and political tensions in unpredictable but potentially dangerous ways.

In short, these [and other] new security challenges require us to think creatively, and to adapt our traditional approaches to better meet the needs of our new era. But one time-honoured precept holds more firmly today than ever: it all begins with prevention.

United Nations Secretary-General Kofi Annan  
3 April 2000<sup>i</sup>

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<sup>i</sup> *'We the Peoples': The Role of the United Nations in the 21st Century*, Millennium Report of the Secretary-General, UN Doc. A/54/2000, 3 April 2000 <<http://www.un.org/millennium/sg/report/full.htm>> at ¶196-197.

## I. Introduction

Climate change<sup>1</sup> is a long-term global security problem. It requires global solutions. Ideally, these solutions will be implemented by willing states acting in concert. However, despite some important recent advancements, including the 2005 entry-into-force of the Kyoto Protocol<sup>2</sup>, current international responses to climate change suggest that voluntary measures alone may not be successful in stemming this threat. Recognizing this possibility, the following paper assesses whether the Security Council possesses sufficient legal authority within the United Nations [UN] system to compel states to address the causes and consequences of climate change.

Mandatory international measures to address climate change remain an extreme response, and it is not the purpose of this paper to advocate their current adoption. The international community possesses numerous non-coercive mechanisms to address this emerging threat, from voluntary implementation of national legislation to further international negotiation and provision of bilateral and multilateral capacity-building assistance. These mechanisms can and should be attempted first. However, in the event that these mechanisms prove insufficient to stem the causes and consequences of climate change, it is important to understand the authority available to the Security Council to require state action, and its legal and political limitations. This paper seeks to initiate discussion of this issue, with the long-term goal of developing an institutional framework to respond to this emerging threat in a rational and methodical manner, if and when the necessity arises.

Part II provides a brief overview of the clear links between climate change and human security<sup>3</sup>, and the inadequacy to date of international efforts to address these issues. This is

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<sup>1</sup> For the purposes of this paper, “climate change” is defined in accordance with the United Nations Framework Convention on Climate Change, (1992) 31 I.L.M. 849 [Framework Convention] as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.” Article 1(2).

<sup>2</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, (1998) 37 I.L.M. 22.

<sup>3</sup> For the purposes of this paper, “human security” refers to protecting individuals from serious threats to life, health and personal well-being. The overarching theme in the human security discourse is the protection of individuals from harm, as contrasted with more abstract notions of state security. In general, this includes a variety of issues, ranging from generally-accepted concepts such as human rights and the rule of law, to protection from the effects of conflict, through to more controversial notions of freedom from want. For a detailed discussion of these various conceptions of human security see, *e.g.*, Fen Hampson *et al.*, *Madness in the Multitude: Human Security and World Disorder* (Oxford: Oxford University Press, 2002): 14-37. While discussion of human security typically focuses on responding to direct threats to individuals, such as conflict and state repression, this paper adopts a more expansive definition including longer term issues such as addressing the causes of climate change, recognizing that

followed in Part III by a detailed analysis of the source and content of the legal authority of the Security Council, in particular the UN Charter<sup>4</sup>, including a discussion of its evolving application in the context of non-traditional security threats. This general analysis provides the theoretical foundation for Part IV, which applies this legal framework to the specific issue of climate change, noting the substantial authority of the Security Council to take binding decisions relating to this subject, and the wide range of available enforcement measures. Moving beyond this legal framework, Part V recognizes that political will to exercise this authority will be the crucial ingredient for any successful Security Council efforts to address climate change, beginning a discussion of the theoretical and institutional bases upon which such will might be premised. Finally, Part VI summarizes the conclusion that the Security Council has the legal authority to address the causes and consequences of climate change, and that its recent counter-terrorism measures provide an illustrative institutional framework within which to work to address this emerging ‘threat to international peace and security’.

## II. Climate Change and Human Security

Climate change poses a clear long-term global security threat. There is no doubt that it will have profound negative effects on human security, with corresponding national and international security implications, with projected consequences ranging from weather extremes to resource depletion and exacerbation of existing social conflicts, from compounding disease epidemics through to the complete disappearance of entire nation states, particularly low-lying island states in the South Pacific. The following section provides a brief overview of the climate change phenomenon and its potential future security implications, highlighting the general inadequacy of current international measures to stem these threats.<sup>5</sup>

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responding solely to its direct consequences is an ineffective long-term strategy. This paper also recognizes the clear long-term link between human, national and international security.

<sup>4</sup> Charter of the United Nations, 26 June 1945, Can. T.S. 1945 No. 7 <[www.un.org/](http://www.un.org/)> [UN Charter].

<sup>5</sup> The following section is intended simply to provide context for future discussion of remedial measures. For more detailed scientific discussion of the specific causes and projected human security implications of climate change see, *e.g.*, other papers presented at the *Human Security and Climate Change* workshop. See also the Global Environmental Change and Human Security Program <[www.gechs.org](http://www.gechs.org)>. For a discussion of the links between security and environmental factors, including but not limited to climate change, see Thomas Homer-Dixon, *Environment, Scarcity and Violence*, Princeton: Princeton University Press, 1999. See also Jutta Brunnée, “The United States and International Environmental Law: Living with an Elephant,” (2004) 15(4) *Eur. J. Int’l. L.* 617 at 643; and, J.R. McNeil, “Environmental Change and Security,” Chapter 8, *Grave New World: Security Challenges in the 21<sup>st</sup> Century*, ed. M.E. Brown, Washington, D.C.: Georgetown University Press, 2003, 178-196.

Since at least the 1970s, numerous international actors have recognized a requirement for comprehensive scientific information concerning global climate change, as a foundation for coordinated multilateral remedial action. This resulted in the 1972 UN Conference on the Human Environment in Stockholm, and the subsequent General Assembly establishment the same year of a specialized agency to address environmental concerns within the UN system, the United Nations Environment Programme [UNEP].<sup>6</sup> In 1988 the World Meteorological Organization and UNEP established the Intergovernmental Panel on Climate Change [IPCC], specifically to provide independent and detailed assessment of scientific evidence relating to this phenomenon.<sup>7</sup> The IPCC has contributed substantially to the understanding of climate change, completing three comprehensive assessment reports and numerous smaller analyses.<sup>8</sup> Further significant information emanates from concerned governmental and non-governmental organizations worldwide.<sup>9</sup>

These multinational efforts have established without doubt that climate change is a scientific certainty. The average temperature of the earth is increasing at a rate unprecedented in modern history. Indeed, “[t]he 1990s were the warmest decade on record”.<sup>10</sup> Although specific projections differ, there is little disagreement that this trend will continue for the foreseeable future. Scientific assessments also show that there is a direct and significant causal link between climate change and preventable human activity, in addition to the natural environmental factors

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<sup>6</sup> UN General Assembly Resolution 2997 (XXVII) (15 December 1972). For more information on UNEP and its activities, see <[www.unep.org](http://www.unep.org)>.

<sup>7</sup> The IPCC defines its role as follows: “to assess on a comprehensive, objective, open and transparent basis the scientific, technical and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation.” <<http://www.ipcc.ch/about/about.htm>>. Within the IPCC it is Working Group II that “assesses the scientific, technical, environmental, economic and social aspects of the vulnerability (sensitivity and adaptability) to climate change of, and the negative and positive consequences for, ecological systems, socio-economic sectors and human health”. <<http://www.ipcc-wg2.org/index.html>>

<sup>8</sup> See IPCC publications website <<http://www.ipcc-wg2.org/index.html>>.

<sup>9</sup> See, e.g., Center for International Climate and Environmental Research - Oslo <[www.cicero.uio.no/index\\_e.asp](http://www.cicero.uio.no/index_e.asp)>; International Institute for Sustainable Development <[www.iisd.org](http://www.iisd.org)>.

<sup>10</sup> UN Secretary-General Kofi Annan, *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, UN Doc. A/59/2005, 21 March 2005, <[www.un.org/largerfreedom/report-largerfreedom.pdf](http://www.un.org/largerfreedom/report-largerfreedom.pdf)> at ¶160 [*In larger freedom*].

influencing this phenomenon.<sup>11</sup> Greenhouse gases<sup>12</sup> have been identified as the principal man-made contributors of climate change.

Numerous international actors recognize the threats posed by climate change, including individual states<sup>13</sup> and organizations such as the UN<sup>14</sup>. Indeed, there is no doubt that climate change will have significant “adverse effects”.<sup>15</sup> In addition to its resulting “environmental and development challenges”,<sup>16</sup> this phenomenon also poses a clear long-term threat to global security. Although the specific manner in which this threat will manifest itself is not yet clear<sup>17</sup>,

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<sup>11</sup> The UN Secretary-General observes that “[t]he overwhelming majority of scientists now agree that human activity is having a substantial impact on the climate.” *Ibid.*

<sup>12</sup> For the purposes of this paper, “greenhouse gases” are defined in accordance with the Framework Convention, *supra* note 1, as “those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation.” Article 1(5).

<sup>13</sup> See, *e.g.*, Framework Convention, *ibid.*, Preamble.

<sup>14</sup> For example, UN General Assembly Resolution 44/206 (22 December 1989) recognizes the long-term threat posed to many low-lying states as a result of rising sea levels fuelled by climate change. A recent report of the Secretary-General on the challenges facing the UN underscored the threat posed by climate change, arguing that:

[o]ne of the greatest environmental and development challenges in the twenty-first century will be that of controlling and coping with climate change. The overwhelming majority of scientists now agree that human activity is having a significant impact on the climate. Since the advent of the industrial era in the mid-eighteenth century, atmospheric concentrations of greenhouse gases have increased significantly, the earth has warmed considerably and sea levels have risen measurably. The 1990s were the warmest decade on record, forcing glaciers and Arctic ice to retreat. With the concentration of greenhouse gases projected to rise still further over the next century, a corresponding increase in the global mean surface temperature is likely to trigger increased climate variability and greater incidence and intensity of extreme weather events, such as hurricanes and droughts.

*In larger freedom*, *supra* note 10 at ¶60.

<sup>15</sup> As defined in the Framework Convention, *supra* note 1,

“[a]dverse effects of climate change” means changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.

Article 1(1).

<sup>16</sup> *In larger freedom*, *supra* note 10 at ¶60.

and many, if not most, of its projected security consequences will be indirect, this does not mean that the threat to human, state and international security posed by climate change is any less real.

Climate change can be expected to contribute to resource scarcity, for example through disruption of production cycles, extreme weather patterns, desertification or reduction of water resources. In turn, these resource implications may exacerbate conflict in regions already prone to violence. While there is little evidence of a direct causal connection between environmental factors and violent conflict outbreak, there is clear support for the conclusion that resource scarcity can and often does magnify existing disputes.<sup>18</sup> This may contribute to the outbreak or exacerbation of violence, particularly in rural areas of the developing world.<sup>19</sup> Although such conflict will typically be sub-national rather than international<sup>20</sup>, this may nonetheless contribute to serious cross-border implications including destabilizing refugee flows or the threat of conflict spillover.<sup>21</sup>

Even in the absence of outright conflict, the resource implications of climate change itself can be expected to propel significant long-term refugee flows for economic reasons. Environmental conditions resulting from climate change may also exacerbate the spread of disease, both directly and through the health impact of the conflict cycle described above.<sup>22</sup> Each of these factors may in turn further contribute to national and international insecurity.<sup>23</sup>

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<sup>17</sup> Indeed, the 2005 *Human Security and Climate Change* workshop itself is premised on the understanding that the “causal chain from climate change to significant impacts on human security is likely to be long, complex, and full of uncertainties” <[http://www.cicero.uio.no/humsec/human\\_security.html](http://www.cicero.uio.no/humsec/human_security.html)>.

<sup>18</sup> See, e.g., Homer-Dixon, *supra* note 5 at 178, noting that “environmental scarcity is not sufficient, by itself, to cause violence; when it does contribute to violence, research shows, it always interacts with other political, economic, and social factors.” See also McNeil, *supra* note 5 at 185ff. While this is a reciprocal relationship, in the event of irreversible environmental damage, this “can become a permanent source of social stress”. Homer-Dixon, *ibid.* at 179.

<sup>19</sup> Homer-Dixon, *ibid.* at 177-180.

<sup>20</sup> *Ibid.* at 166-7, 179-180.

<sup>21</sup> *Ibid.* at 167, 180. This could also seriously disrupt trade ties. *Ibid.*

<sup>22</sup> See, e.g., United Nations, *A more secure world: Our shared responsibility: Report of the High-level Panel on Threats, Challenges and Change*, UN Doc. A/59/656 (2 December 2004) [High-level Panel], at ¶22, recognizing that “climate change exacerbates the occurrence of such infectious disease as malaria and dengue fever” and referring to a joint study of the World Health Organization, WMO and UNEP.

<sup>23</sup> The High-level Panel concludes that “[p]overty, infectious disease, environmental degradation and war feed one another in a deadly cycle.” *Ibid.*

Perhaps the most obvious threat to human and national security is posed by projected rise of sea levels resulting from global temperature increases and the melting of polar ice caps. Low-lying coastal areas are threatened with wide-spread and severe flooding, including major populated areas in both the developed and developing world. Entire states are almost certain to disappear, in particular island nations in the South Pacific, with only the specific timing remaining in doubt. There is little doubt that the international security implications of climate change will be severe, albeit for some states more than others.<sup>24</sup>

Over the past three decades, significant international efforts have been undertaken to address the causes of climate change.<sup>25</sup> Almost all states are parties to the 1972 United Nations Framework Convention on Climate Change [Framework Convention]<sup>26</sup>, which recognizes in its Preamble that the global warming caused by greenhouse gases buildup attributable to human activity “may adversely affect natural ecosystems and humankind”. Intended as a statement of guiding principles, the Framework Convention was the first comprehensive effort to specifically tackle the challenges posed by climate change. However, while recognizing the global nature of the problems posed by climate change, and the general responsibility of states to prevent harm to others<sup>27</sup>, the Framework Convention reaffirmed “the principle of sovereignty of States in

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<sup>24</sup> The UN Secretary-General recently noted the clear and inequitable national security implications of these developments for some states, observing that:

[t]he countries most vulnerable to such changes — small island developing States, coastal nations with large numbers of people living in low-lying areas, and countries in the arid and semi-arid tropics and subtropics — are least able to protect themselves. They also contribute least to the global emissions of greenhouse gases. Without action, they will pay a bitter price for the actions of others.

*In larger freedom*, *supra* note 10 at ¶60.

<sup>25</sup> This movement build upon the success of earlier codification efforts to address threats to specific elements of the global commons, including the Antarctic and the deep sea bed, and finds its genesis in the environmental awakening of the 1970s. By 2001, UNEP had identified 41 key environmental treaties, most adopted in the preceding 6 years. UNEP, *International Environmental Governance: Multilateral Environmental Agreements (MEAs)*, UN Doc. UNEP/IGM/4/INF/3 (16 November 2001), as cited in Brunnée, *supra* note at 636.

<sup>26</sup> *Supra* note 1. As of 24 May 2004, 189 states are parties to the Framework Convention. See, e.g., United Nations Framework Convention on Climate Change: Status of Ratification <[http://unfccc.int/files/essential\\_background/convention/status\\_of\\_ratification/application/pdf/ratlist.pdf](http://unfccc.int/files/essential_background/convention/status_of_ratification/application/pdf/ratlist.pdf)>[Framework Convention Ratification].

<sup>27</sup> The Preamble recognized “that States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”. *Supra* note 1.

international cooperation to address climate change”.<sup>28</sup> In keeping with this understanding, the Framework Convention outlined non-binding emissions stabilization principles and information-gathering mechanisms, rather than imposing specific binding emissions reduction standards for individual states. Indeed, its Preamble simply recognized “that States *should* enact effective environmental legislation”.<sup>29</sup>

Building upon the general principles delineated in the Framework Convention, the Kyoto Protocol established specific measures to reduce greenhouse gas production by individual states. This treaty entered into force in February 2005, establishing binding legal obligations for its parties. However, a significant number of states have not ratified this treaty, including major producers of greenhouse gases such as the United States.<sup>30</sup> In addition, the Kyoto Protocol is temporally restricted, establishing obligations extending only to 2012.<sup>31</sup> It establishes no ongoing open-ended emissions restrictions. While the Kyoto Protocol an important development, it is clearly not a complete answer to the problems posed by climate change.<sup>32</sup>

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<sup>28</sup> *Ibid.*, Preamble.

<sup>29</sup> *Supra* note 1. Emphasis added. As a matter of law, use of ‘should’ indicates an aspirational statement of principle rather than the establishment of a binding obligation (which, in contrast, would typically be signalled with the mandatory language ‘shall’).

<sup>30</sup> Kyoto Protocol: Status of Ratification  
<[http://unfccc.int/files/essential\\_background/kyoto\\_protocol/application/pdf/kpstats.pdf](http://unfccc.int/files/essential_background/kyoto_protocol/application/pdf/kpstats.pdf)> [Kyoto Protocol Ratification].

<sup>31</sup> See, e.g., *supra* note 2, Article 3(1).

<sup>32</sup> This limitation is not lost on many international actors. For example, UN Secretary-General Kofi Annan recently argued that:

We must develop a more inclusive international framework beyond 2012, with broader participation by all major emitters and both developed and developing countries, to ensure a concerted globally defined action, including through technological innovation, to mitigate climate change, taking into account the principle of common but differentiated responsibilities.

*In larger freedom*, *supra* note 10 at ¶61. See also High-level Panel, *supra* note 22 at ¶72.

Indeed, several Pacific Ocean island states expressly recognized the inadequacy of the Kyoto Protocol in declarations made immediately upon their signature of this treaty. For example, the Cook Islands declared that “in light of the best available scientific information and assessment on climate change and its impacts, it considers the emissions reduction obligation in article 3 of the Kyoto Protocol to be inadequate to prevent dangerous anthropogenic interference with the climate system.” Kyoto Protocol Ratification, *supra* note 30. Niue and Nauru entered identical declarations, *mutatis mutandis*. *Ibid.*

Despite these international efforts, and numerous other measures to address related environmental concerns<sup>33</sup>, projections indicate that climate change will continue for the foreseeable future.<sup>34</sup> While these measures are a significant advancement, they will not eliminate the causes and consequences of climate change. Simply put, current international remedial measures are inadequate.<sup>35</sup>

In summary, while many of the specific consequences identified in this part are long-term in nature, and some necessarily speculative, the overall security threat posed by climate change is no less real for this uncertainty. Climate change is a reality, and projections indicate that the this threat will continue for decades. That its causes have not yet been adequately addressed only heightens the inevitable long-term negative security consequences of climate change. Should voluntary state action fail to stem these threats, more coercive international action might well be warranted.

### **III. The UN Charter and Security Council Authority**

Within the UN system, only the Security Council is endowed with comprehensive coercive enforcement authority. This authority rests on the UN Charter, as interpreted and applied since the Organization's establishment in 1945. Following an overview of the general legal principles governing UN Charter interpretation, this section addresses the specific legal authority currently vested in the Security Council, and the evolving manner in which it has been exercised since the end of the Cold War to address non-traditional security challenges. This section illustrates that the Security Council possesses substantial legal authority to respond to non-traditional threats, using a wide variety of non-forceful and forceful measures.<sup>36</sup>

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<sup>33</sup> While the Framework Convention and its Kyoto Protocol are the two major treaties specifically addressing climate change, numerous other multilateral efforts have addressed further specific global environmental concerns. See, e.g., *International Environmental Governance*, *supra* note 25. These include, for example: the Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, (1987) 26 I.L.M. 1550; the Basel Convention on Transboundary Movement of Hazardous Wastes and Their Disposal, (1989) 28 I.L.M. 657; and, the Cartagena Protocol on Biosafety to the Biodiversity Convention, (2000) 39 I.L.M. 1027.

<sup>34</sup> See, e.g., *In larger freedom*, *supra* note 10.

<sup>35</sup> In addition, the High-level Panel concluded that “[r]egional and global multilateral treaties on the environmental are undermined by inadequate implementation and enforcement by Member States.” *Supra* note 22 at ¶54.

<sup>36</sup> The Security Council legal authority outlined in Part III is applied to the specific issue of climate change in Part IV, below.

## Interpreting the UN Charter

The UN Charter is the multilateral treaty establishing the UN, which states must ratify without reservation as a precondition of membership. This treaty delineates the structure of the Organization, and its responsibilities and legal authority. As the product of a multilateral treaty, the UN cannot act outside of the authority granted to it by Members. However, this authority is not confined to the express wording of the UN Charter. Rather, it has been interpreted broadly in the decades since the Organization's establishment in 1945, through state and organizational practice, as confirmed by the International Court of Justice [ICJ] in a number of early advisory opinions.<sup>37</sup> This is consistent with general international legal principles governing the interpretation of treaties establishing international organizations, where the underlying legal document is typically viewed much like a national constitution requiring flexible long-term interpretation.

In one of its earliest advisory opinions, the ICJ recognized that for the UN to fulfill the role assigned to it by its Members, it must possess a separate legal existence from them.<sup>38</sup> The Court reached this conclusion despite the fact that the UN Charter did not expressly provide for such legal personality, concluding that “the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”<sup>39</sup> Similarly, the Court has recognized that both the General Assembly and Security Council possess authority beyond that expressly delineated in the UN Charter.<sup>40</sup>

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<sup>37</sup> See, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174. [*Reparations Case*]; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, 1962 I.C.J. Rep. 151 [*Certain Expenses*]; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, [1971] I.C.J. Rep. 16 [*Namibia*]. The ICJ does not possess binding powers of judicial review within the UN system. Nonetheless, its advisory opinions provide authoritative statements concerning the law governing the Organization and should be accorded substantial weight in any such determination, particularly when generally accepted through the subsequent practice of Members..

<sup>38</sup> *Reparations Case*, *ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> For example, this recognition supported the establishment of ‘peacekeeping’ operations. Although one of the most recognizable features of the modern-day UN, ‘peacekeeping’ is not mentioned anywhere within the UN Charter. However, the legal authority of the organization to establish such forces is beyond doubt, and is (now) accepted by UN Members. The ICJ recognized this authority in an advisory opinion answering challenges to mandatory expense assessments resulting from the first two peacekeeping operations. See *Certain Expenses*, *supra* note 37.

Turning itself to the Purposes of the UN, as delineated in Article 1 of the UN Charter<sup>41</sup>, the Court in *Certain Expenses* concluded that:

[t]he first two purposes as stated in paragraphs 1 and 2, may be summarily described as pointing to the goal of international peace and security and friendly relations ... The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition. These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action. But when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.<sup>42</sup>

A presumption of legality thus underlies UN action, particularly when it is taken to maintain or restore international peace and security.

### **Security Council Authority**

Within the UN, the Security Council alone possesses coercive legal authority sufficient to compel state action when international peace and security is threatened, rendering it without doubt the most powerful UN organ.<sup>43</sup> A representative body composed of five permanent

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<sup>41</sup> *Supra* note 4. Article 1 provides:

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

<sup>42</sup> *Supra* note 37 at 167-168.

<sup>43</sup> No other UN organ (*i.e.* General Assembly, International Court of Justice, Secretariat, Trusteeship Council or Economic and Social Council) possesses binding legal authority remotely analogous to that granted to the Security Council pursuant to Chapter VII of the UN Charter, *supra* note 4. The extent of this unique Security Council authority is outlined in detail below.

members [the P5]<sup>44</sup> and ten non-permanent members<sup>45</sup>, the Security Council acts on behalf of all UN Members<sup>46</sup>, who have expressly conferred upon it “primary responsibility for the maintenance of international peace and security”.<sup>47</sup> As a primary organ of the UN, the legal authority of the Security Council necessarily rests on the UN Charter. It cannot act outside of the authority vested in it, implicitly or explicitly, by UN Members.

Substantive Security Council decisions on non-procedural matters require “an affirmative vote of nine members including the concurring votes of the permanent members”.<sup>48</sup> This effectively grants each permanent member a veto over Security Council decision making. It is now accepted as a result of UN practice that ‘concurring vote’ also includes abstention<sup>49</sup>, with the result that substantive Security Council decisions may be taken with the affirmative vote of any nine members, so long as no P5 member actually casts a negative vote.<sup>50</sup>

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<sup>44</sup> The permanent members of the Security Council are: China, France, Russia, the United Kingdom and the United States. *Ibid.*, Article 23(1).

<sup>45</sup> Non-permanent members are elected for two-year non-renewable terms by the UN General Assembly. *Ibid.*, Article 23(2).

<sup>46</sup> Article 24(1), *ibid.*, provides the UN Members “agree that in carrying out its duties under this responsibility [for the maintenance of international peace and security] the Security Council acts on their behalf.” As of 1 May 2005, 191 states are UN Members <[www.un.org/Overview/unmember.html](http://www.un.org/Overview/unmember.html)>. This includes most, though not all, states in the world.

<sup>47</sup> *Ibid.*, Article 24(1). The authority conferred pursuant to Article 24 is primary, not exclusive, and does not prevent other UN organs from addressing issues of international peace and security, particularly in the event of Security Council paralysis. See, e.g., *Certain Expenses*, *supra* note 37, recognizing the ‘secondary’ authority of the UN General Assembly for the maintenance of international peace and security, in the context of peacekeeping operations.

<sup>48</sup> UN Charter, *supra* note 4, Article 27(3). Security Council decisions “on procedural matters” require “an affirmative vote of nine members”, but do not require permanent member concurrence. Article 27(2). Article 27(3) applies to “all other matters”.

<sup>49</sup> See, e.g., *Namibia*, *supra* note 37 at 16, 22. See also Bruno Simma, ed., *The Charter of the United Nations*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2002): 493. Although the legal basis for this development remains open to debate (see, e.g., Simma, *ibid.* at 495-498), it is a significant precedent for evolving interpretations of the UN Charter in light of state and organizational practice.

<sup>50</sup> As a result, ideological disagreement between permanent members can be a bar to effective Security Council decision making. Indeed, the Cold War ensured that prior to 1989 the Security Council rarely invoked its Chapter VII authority, a situation often characterized as ‘paralysis’. Negative voting was frequent in this period. This situation changed dramatically with the thaw in relations between the United States and Soviet Union, and the subsequent end of the Cold War, although this trend may have been short-lived.

Provided that this mandatory decision-making threshold is achieved, the UN Charter vests the Security Council with significant authority to realize its ‘primary responsibility’. Chapter VI of the UN Charter outlines numerous non-binding mechanisms, short of binding ‘decisions’, available to the Security Council to assist Members in the pacific resolution of disputes likely to threaten international peace and security, including “recommend[ing] appropriate procedures or methods of adjustment”.<sup>51</sup> In addition to addressing situations referred to it by Members<sup>52</sup>, the Security Council has specific authority in its own right to “investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.”<sup>53</sup> Although the Security Council has frequently exercised its authority under Chapter VI to assist in the maintenance of international peace and security, Members are not required as a matter of law to follow any resulting Security Council recommendations. Instead, implementation of Chapter VI measures rests on express Member consent to the specific proposed Security Council measure.

In contrast, binding enforcement authority is established by Chapter VII of the UN Charter, which vests the Security Council with authority to either recommend or require state action to address threats to international peace and security, up to and including the use of armed force.<sup>54</sup> While potentially coercive, Security Council Chapter VII enforcement measures nonetheless rest upon the prior legal consent of all Members, including the target state(s), expressed through their voluntary ratification of the UN Charter.<sup>55</sup> Article 25 provides that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”<sup>56</sup> Article 48 further explicitly mandates that:

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<sup>51</sup> *Supra* note 4, Article 36(1). See also Articles 33(2), 37(2), and 38.

<sup>52</sup> *Ibid.*, Article 35(1).

<sup>53</sup> *Ibid.*, Article 34.

<sup>54</sup> See, *e.g.*, *ibid.*, Articles 41 and 42, discussed below.

<sup>55</sup> Although the UN Charter itself is silent on this point, withdrawal of a Member from the UN following the imposition of enforcement measures against it would almost certainly not terminate the (ex-)Member’s obligation to comply.

<sup>56</sup> A continuing legal controversy surrounds the extent, if any, to which the Security Council may require action by non-Member states. While article 2(6) requires Members to ensure the compliance of non-Member states, as a matter of international treaty law the specific obligations of the UN Charter cannot apply directly to bind non-parties without their consent or the evolution of a principle of customary

[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.<sup>57</sup>

Furthermore, Article 103 establishes a formal legal hierarchy in which obligations under the UN Charter are paramount (*i.e.* “shall prevail”) over all other international (treaty) obligations of UN Members.<sup>58</sup>

### **Chapter VII Threshold: ‘Threat to International Peace and Security’**

As a matter of law, it is the invocation of its Chapter VII authority that permits the Security Council to impose enforcement measures and intervene in the otherwise sovereign domestic activities of UN Members.<sup>59</sup> The Security Council cannot require Members to act without first invoking, or otherwise relying on, its Chapter VII authority.<sup>60</sup>

Article 39 establishes the threshold criteria for invoking the Security Council’s Chapter VII enforcement authority, providing that:

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international law to that effect. See, *e.g.*, Vienna Convention on the Law of Treaties, (1969) 1155 U.N.T.S. 331, Articles 34, 35 and 38. While an interesting legal issue, its relevance to this current paper is limited, as non-party states are few, typically small and pose little threat to the global climate or human security. For example, as of 1 May 2005, the only non-member state maintaining permanent observer status at the UN is the Holy See <[www.un.org/Overview/missions.htm#nperm](http://www.un.org/Overview/missions.htm#nperm)>.

<sup>57</sup> Article 48 further provides that “[s]uch decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.” *Supra* note 4.

<sup>58</sup> Article 103, *ibid.*, establishes 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 present Charter shall prevail.

<sup>59</sup> State sovereignty is one of the fundamental principles underlying the UN system; however, it is not absolute. Article 2(7) of the UN Charter, *ibid.*, provides:

[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; *but this principle shall not prejudice the application of enforcement measures under Chapter VII.*

Emphasis added.

<sup>60</sup> Invocation of Chapter VII authority usually occurs through an express provision to this effect noting that the Security Council is ‘acting under Chapter VII of the Charter of the United Nations’. Typically this statement is the final paragraph of the resolution’s preamble, prior to the delineation of specific measures enacted pursuant to this Security Council authority.

[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.<sup>61</sup>

Although the UN Charter places such determinations within the discretion of the Security Council<sup>62</sup>, it does not further define the concepts of ‘threat to the peace, breach of the peace, or act of aggression’. Instead, the legal meaning of these concepts, hereinafter referred to collectively as ‘threats to international peace and security’<sup>63</sup>, has developed and evolved through actual organizational and state practice.

Traditional understandings of ‘threats to international peace and security’ focused on cross-border security issues, in particular actual or threatened interstate armed conflict. This was clearly the context envisaged in 1945, in the final months of the Second World War, when the UN Charter was drafted and the Security Council imbued with its unique enforcement authority. As a result, Security Council invocation of Chapter VII in the context of the actual or threatened use of armed force in international relations is not controversial.<sup>64</sup>

However, invocation of Chapter VII is not limited to international armed conflicts. Indeed, one of the earliest characterizations of an armed conflict as a ‘threat to international peace and security’ occurred in the context of the civil war in the Congo in 1961.<sup>65</sup> The post-Cold War practice of the Security Council has greatly expanded the situations in which Chapter VII coercive authority has been invoked and enforcement measures authorized to respond to internal conflict. Since 1990, civil wars have frequently formed the basis for Chapter VII invocation, perhaps not surprisingly given the recent preponderance of this type of conflict over traditional interstate conflicts. Security Council characterization of civil wars as sufficient basis for Chapter

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<sup>61</sup> Article 41 delineates “measures not involving the use of armed force”, while Article 42 supports more forceful measures. The scope and content of these measures are analyzed in more detail below.

<sup>62</sup> Potential review or limitation of Security Council authority is addressed in more detail below.

<sup>63</sup> This is consistent with the general practice of the Security Council, where ‘breach of the peace’ and ‘act of aggression’ are rarely used as a basis for the invocation of Chapter VII.

<sup>64</sup> The specific enforcement measures applied may nonetheless remain controversial. These are discussed in more detail below. Examples of international armed conflicts that the Security Council has characterized as a threat to the peace, breach of the peace or act of aggression, supporting the invocation of Chapter VII, include: the 1990 Iraqi invasion of Kuwait (Security Council Resolution 660 (2 August 1990)); and, the international conflicts resulting from the disintegration of the Federal Republic of Yugoslavia (Security Council Resolution 713 (25 September 1991)).

<sup>65</sup> Security Council Resolution 161 (21 February 1961).

VII actions is also not particularly controversial, given their clear potential for destabilizing international effects, whether through refugee flows, cross-border spillover effects or the intervention of third-party states.<sup>66</sup>

Over the past decade, massive human rights catastrophes occurring within sovereign states have also increasingly been viewed by the Security Council as sufficient justification for the invocation of its Chapter VII authority, whether or not linked to actual civil wars, particularly in cases of genocide or widespread and systematic crimes against humanity.<sup>67</sup> In this context, Security Council resolutions invoking Chapter VII typically continue to refer to the international ramifications of the civil catastrophe or internal repression in question, including refugee flows and the potential for cross-border conflict.<sup>68</sup> Security Council determinations of such internal human rights catastrophes as ‘threats to international peace and security’ now appear to rest on a solid legal foundation, bolstered though not necessarily determined by their international manifestations.<sup>69</sup> Nonetheless, in at least some circumstances, Security Council characterization of the underlying situation as an actual objective threat to ‘international’ peace and security strains credibility.<sup>70</sup>

Until recently, actual Security Council characterizations of ‘threats to international peace and security’ focused on discrete and geographically-restricted situations. Typically, Chapter VII

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<sup>66</sup> Recent situations where civil wars have formed the basis for a Chapter VII invocation include: the Democratic Republic of the Congo (Security Council Resolution 1493 (28 July 2003); and, Côte d’Ivoire (Security Council Resolution 1528 (27 February 2004));

<sup>67</sup> See, e.g., Security Council responses to humanitarian crises in Côte d’Ivoire, the Democratic Republic of Congo, Haiti, Kosovo, Somalia and Sudan.

<sup>68</sup> Ratner argues that “resolutions included the usual transborder link to refugees or arms flows to placate states like China that feared a prodemocratization push under the guise of ending threats to the peace.” Steven R. Ratner, “The Security Council and International Law,” Chapter 37, *The UN Security Council: From the Cold War to the 21<sup>st</sup> Century* (Boulder, Co.: Lynne Rienner, 2004): 591-605, at 598.

<sup>69</sup> See, e.g., High-level Panel, *supra* note 22 at ¶203.

<sup>70</sup> For example, Security Council resolutions addressing the humanitarian disaster in Somalia, while not controversial given the clear catastrophic need and absence of effective government authority, nonetheless required characterizing this internal crisis as an international threat. Similarly, the 1994 Security Council response to the military coup overthrowing the democratically-elected Aristide government in Haiti required characterizing as a ‘threat to international peace and security’ little more than a small flow of refugees from the island. Although the Security Council noted the ‘unique’ character of the latter situation, either the legal authority for it to act in these circumstances existed or it did not. UN Member acquiescence in this and other similar determinations indicates a strong presumption of continued legality should such determinations by the Security Council continue. As noted above, a general presumption of Security Council legality already has a firm basis in UN jurisprudence.

measures have been directed against specific states or non-state entities, to remedy particular and defined threats<sup>71</sup> (although temporal and geographical restrictions have in some cases been problematically ambiguous, and the threats sometimes ill-defined<sup>72</sup>). However, starting in the late 1990s, the Security Council began to address broad issues relating to conflicts in general, including threats to children and civilians, though without specifically invoking Chapter VII or imposing mandatory enforcement measures following such characterizations.<sup>73</sup>

Following the terrorist attacks in and against the United States on 11 September 2001, the Security Council expanded significantly the concept of ‘threat to international peace and security’, eliminating any reference to geographic or temporal restrictions in resolutions expressly invoking Chapter VII.<sup>74</sup> Not only did the Security Council declare the terrorist attacks in New York, Washington, D.C., and Pennsylvania themselves to be ‘threats to international peace and security’<sup>75</sup>, it also recognized the threat posed by terrorism in general and adopted measures to address it.<sup>76</sup> The clear cross-border implications of international terrorism bolster the legality of this characterization, and there has been little legal controversy to date on this particular point.

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<sup>71</sup> See, *e.g.*, Paul Szasz, “The Security Council Starts Legislating,” (2002) 96(4) *Am. J. Int’l. L.* 901 at 901-902..

<sup>72</sup> See, *e.g.*, Security Council Resolution 678 (29 November 1990), which established a legal basis, in addition to self-defence, for “Member States co-operating with the Government of Kuwait ... to use all necessary means to uphold and implement resolutions 660 (1990) and all subsequent resolutions and to restore international peace and security in the area”. The latter clause clearly lacks geographical precision, and the open-ended nature of this resolution played a significant role in the legal and political uncertainty leading up to the American-led invasion of Iraq in 2003.

<sup>73</sup> Szasz, *supra* note 71 at 902. Instead, the Security Council typically recommended (*e.g.* ‘called upon’ or ‘urged’) that Members ratify treaties or otherwise bring their actions into compliance with international standards. As a matter of law, this language is extremely weak, and does not require state compliance. See, *e.g.*, *ibid.* This trend has continued, illustrated by Security Council Resolution 1539 (22 April 2004), addressing issues concerning children and armed conflict without express invocation of Chapter VII.

<sup>74</sup> See, in particular, Security Council Resolution 1373 (28 September 2001).

<sup>75</sup> Security Council Resolution 1368 (12 September 2001).

<sup>76</sup> Resolution 1373, *supra* note 74, contains no specific reference to al-Qaeda. Bantekas argues that this “suggest that in sponsoring the resolution, the United States took advantage of the prevailing circumstances and international sentiment by imposing measures on states that the Council would not have adopted in other circumstances and states would not have agreed to be bound to by treaty.” Ilias Bantekas, “The International Law of Terrorist Financing,” (2003) 97(2) *Am. J. Int’l. L.* 315 at 326. Bantekas is careful to note, however that this does not “imply that Resolution 1373 is devoid of moral value, nor that it was unwarranted.” *Ibid.*

The Security Council has also recently turned itself to the potential security implications of other non-traditional threats, signaling its willingness to further expand the concept of ‘threat to international peace and security’.<sup>77</sup> In particular, although it has not invoked Chapter VII in this context, it has already noted that the HIV/AIDS pandemic might in future constitute a threat to international peace and security.<sup>78</sup> Like terrorism, the Security Council response to this threat is not limited by clear geographical or temporal restrictions, though it has focused on Africa. Unlike terrorism, however, the cross-border security implications of HIV/AIDS are less clear, although it poses an internal threat to numerous states and this may itself have potential long-term indirect destabilizing effects on neighbouring states.<sup>79</sup> Recent UN reform recommendations have nonetheless supported further Security Council treatment of HIV/AIDS as a ‘threat to international peace and security’.<sup>80</sup>

In summary, while the Security Council has shown increasing willingness to intervene in the domestic affairs of UN Members, in a wide variety of circumstances, it has generally continued to justify its invocation of Chapter VII enforcement authority on direct or indirect cross-border or international ramifications. Interventionism on this basis has been generally accepted by UN Members, and appears to rest on a solid legal foundation. Recent practice indicates a further willingness to address global security threats in the absence of clearly-defined

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<sup>77</sup> Indeed, as early as 1992, a Presidential Statement of the Security Council recognized that “[t]he non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to international peace and security.” UN Doc. S/PV.3046 (31 January 1992), cited in Szasz, *supra* note 71 at 904 fn. 33. Presidential Statements are decisions of the Security Council, adopted by consensus (*i.e.* in contrast to the 9/15 majority required for a resolution). See, *e.g.*, Simma, *supra* note 49 at 519.

<sup>78</sup> In the Preamble of Resolution 1308 (17 July 2000), the Security Council:

Reaffirm[ed] the importance of a coordinated international response to the HIV/AIDS pandemic, given its possible growing impact on social instability and emergency situations, ... [and]  
Stress[ed] that the HIV/AIDS pandemic, if unchecked, may pose a risk to stability and security, ... .

Security Council Resolution 1308 (17 July 2000).

<sup>79</sup> For example, the HIV/AIDS pandemic is dramatically reducing national economic development in many African states, redefining and undermining traditional family structures and overwhelming already inadequate social services. In addition, HIV/AIDS threatens the cohesion of national armed forces in many of these states, where infection rates among soldiers can be as high as 30 or 40 percent. All of these factors strain domestic stability, which may eventually also threaten regional security. Direct cross-border security implications are far less obvious, unless one includes international travel of infected persons or the use of HIV/AIDS as a weapon in war.

<sup>80</sup> High-level Panel, *supra* note 22 at ¶67.

geographical or temporal parameters, and a nascent trend towards acceptance of non-traditional soft security issues as ‘threats to international peace and security’ within the meaning of Chapter VII. There is significant legal support for this position.<sup>81</sup>

### **Chapter VII Enforcement Mechanisms**

Once the Security Council has characterized a situation as a ‘threat to international peace and security,’ Chapter VII grants it substantial authority to act, or to require Members to act, providing for options up to and including the use of armed force. Article 41 establishes its authority to impose measures “not involving the use of armed force”, while Article 42 establishes a legal basis for the further application of coercive military measures. Organizational practice since 1945, and in particular since the end of the Cold War, has led to a broad interpretation of specific mechanisms available to the Security Council by virtue of these enforcement powers.

Article 41 provides that:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include 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.

Such measures have been imposed frequently, particularly the ‘complete or partial interruption of economic relations’ (*i.e.* economic sanctions).<sup>82</sup>

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<sup>81</sup> Indeed, the High-level Panel argued that:

[i]n the case of a State posing a threat to other States, people outside its borders or to international order more generally, the language of Chapter VII is inherently broad enough, and has been interpreted broadly enough, to allow the Security Council to approve any coercive action at all, including military action, against a State when it deems this “necessary to maintain or restore international peace and security.” That is the case whether the threat is occurring now, in the imminent future or more distant future; whether it involves the State’s own actions or those of non-State actors it harbours or supports; or whether it takes the form of an act or omission, an actual or potential act of violence or simply a challenge to the Council’s authority.

*Ibid.* at ¶193. This conclusion rested, in part, on the recognition that the Security Council is not bound by legal restrictions governing the use of force by States in self-defence, which allow the use of force only to respond to imminent or ongoing threats. *Ibid.* at ¶194.

<sup>82</sup> See, *e.g.*, recent resolutions imposing targeted economic sanctions, including weapons embargoes and freezing of assets, in the following circumstances: Liberia (Security Council 1532 (12 March 2004)); Côte d’Ivoire (Security Council Resolution 1572 (15 November 2004)); and, Sudan (Security Council Resolution 1591 (29 March 2005)).

The measures specifically delineated in Article 41 are non-exhaustive, serving as “merely illustrative examples”<sup>83</sup>, as recognized in various judicial fora<sup>84</sup> and UN practice. In addition to the listed measures, since the end of the Cold War the Security Council has imposed, among others, the following ‘non-forceful measures to give effect to its decisions’<sup>85</sup>: the creation of an *ad hoc* criminal tribunal<sup>86</sup>; the delineation of an international border<sup>87</sup>; and, the requirement for all Members to implement legislation restricting terrorist financing and curtailing other support for terrorist activities<sup>88</sup>.

This latter measure - requiring domestic legislative enactments to address terrorism - represents a dramatic evolution in Security Council practice.<sup>89</sup> Although often addressed to and requiring action of all UN Members, Chapter VII resolutions mandating Article 41 measures have typically focused on a single situation in a specific geographical area. In contrast, by adopting Resolution 1373, the Security Council effectively exercised legislative functions premised on an open-ended and general international security threat.<sup>90</sup> This is an exceptional development which greatly expands the accepted application of Security Council Chapter VII authority.

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<sup>83</sup> *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (2 October 1995), (1996) 35 I.L.M. 32 [*Tadic*] at 71.

<sup>84</sup> See, e.g., *Certain Expenses*, *supra* note 37 (before the ICJ); and, *Tadic*, *ibid.* (before the ICTY). The Tribunal in *Tadic* concluded that “[i]t is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures.” See also Szasz, *supra* note 71 at 904.

<sup>85</sup> All of the following measures have rested, implicitly or explicitly, on Article 41 of the UN Charter, *supra* note 4. It is unusual for the Security Council to identify a specific Article within Chapter VII upon which it relies to impose enforcement measures. Despite the potential resulting uncertainty, this practice is generally recognized as legal. See, e.g., *Tadic*, *ibid.*

<sup>86</sup> The Security Council established the International Criminal Tribunal for the Former Yugoslavia pursuant to its Chapter VII authority. Security Council Resolution 827 (25 May 1993). Its sister tribunal for Rwanda rests on similar legal authority. Security Council Resolution 955 (8 November 1994).

<sup>87</sup> Resolution 687, *supra* note 72, between Iraq and Kuwait.

<sup>88</sup> Resolution 1373, *supra* note 74.

<sup>89</sup> The measures imposed by Resolution 1373, *ibid.*, have been variously characterized as: “novel”, Bantekas, *supra* note 76 at 315; “unprecedented”, Eric Rosand, “Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism,” (2003) 97(2) Am. J. Int’l. L. 333-341, at 333; and, “pioneering”, Szasz, *supra* note 71 at 905.

<sup>90</sup> Without a defined temporal limitation, the measures imposed by Resolution 1373 will continue in force until terminated by the Security Council. See discussion in Bantekas, *ibid.* at 326, and Szasz, *ibid.* at 902.

Resolution 1373 requires Members to adopt wide-ranging counter-terrorism legislative measures, including in particular measures to stem terrorist financing and facilitate prosecution.<sup>91</sup> Effectively, this resolution imposes upon UN Members obligations drawn from the 1999 International Convention for the Suppression of the Financing of Terrorism [Terrorist Financing Convention]<sup>92</sup>. However, only 4 UN Members had ratified this treaty before the adoption of Resolution 1373, with another 46 signatories, and it had not even entered into force. Only 1 permanent member had ratified the Terrorist Financing Convention prior to September 2001.<sup>93</sup> This limited state ratification suggests that the provisions imposed by the Security Council had not necessarily obtained customary international legal status by 2001, despite their prior reflection in General Assembly resolutions over the preceding decade.<sup>94</sup> Nonetheless, belying this uncertainty, Resolution 1373 imposed sweeping counter-terrorism obligations on UN Members, many with significant domestic legislative implications.<sup>95</sup>

Codification of an existing principle of customary international law is within the legal authority of the Security Council. In fact, the Security Council has expressly codified legal concepts in the past in the absence of a preexisting multinational treaty definition, resting on generally-accepted legal principles.<sup>96</sup> The Security Council also possesses sufficient legal authority to impose legal obligations upon states in the absence of underlying customary

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<sup>91</sup> Resolution 1373, *supra* note 74, ¶1-2. See also Bantekas, *ibid.*, and Rosand, *supra* note 89 at 334, for a discussion of specific measures.

<sup>92</sup> 9 December 1999, 39 I.L.M. 270 (2000). See Bantekas, *ibid.*; and, Szasz, *supra* note 71 at 903. In addition, the Security Council “called upon” states to ratify existing treaties addressing particular aspects of the international terrorism threat (Resolution 1373, *supra* note 74, ¶3), including the Terrorist Financing Convention, a development characterized by Bantekas as “ironic” given the reflection of this treaty in the mandatory measures this resolution imposed. *Ibid.*. While not a binding ‘decision’, this is nonetheless an interesting development given that at the time of Resolution 1373’s adoption, only 1 of the permanent members of the Security Council had itself ratified all of these treaties.

<sup>93</sup> Szasz, *ibid.*

<sup>94</sup> See, e.g., Bantekas, *supra* note 76 at 326; Rosand, *supra* note 89 at 334. Prior to 11 September 2001, only 2 states (Botswana and the United Kingdom) were parties to all existing UN-sponsored counter-terrorism treaties. Rosand, *ibid.* at 337 fn. 30. See, e.g., UN General Assembly Resolutions 49/60 (9 December 1994) (Declaration on Measures to Eliminate International Terrorism) and 51/210 (17 December 1996) (Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism), as discussed in Szasz, *supra* note 71 at 903.

<sup>95</sup> Resolution 1373, *supra* note 74. See also Bantekas, *ibid.*

<sup>96</sup> See, in particular, the crimes against humanity provisions in the Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted pursuant to Resolution 827, *supra* note 86.

principles. Expansive historical interpretations of Article 41, along with the presumption of Security Council legality, support arguments in favour of this authority, particularly given widespread state acquiescence in the Security Council adoption of legislative measures in Resolution 1373.<sup>97</sup>

Resolution 1373 required Members to submit comprehensive annual reports detailing their progress in implementing mandatory counter-terrorism measures, the first within 90 days. To address this and other elements of its implementation, Resolution 1373 established (what is now known as) the Counter-Terrorism Committee [CTC]. This was bolstered with the creation of the Counter-Terrorism Executive Directorate [CTED] in 2004.<sup>98</sup> Express legal authority for the Security Council to establish “such subsidiary organs as it deems necessary for the performance of its duties” is provided in Article 29 of the UN Charter, in addition to the general authority provided in Article 41.<sup>99</sup> In recent UN practice, this mechanism has been adopted frequently to establish sanctions monitoring committees.<sup>100</sup>

As evidenced by its recent activities, the scope of non-forceful measures available to the Security Council pursuant to Article 41 is vast, extending far beyond the measures specifically delineated in the text of the UN Charter. While creative, the Security Council response to

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<sup>97</sup> See, e.g., Ratner, *supra* note 68 at 601; and, Szasz, *supra* note 71 at 903. Szasz, for example, argues that:

[b]y making only a few substantive provisions of the 1999 [Terrorist Financing] Convention obligatory, the Security Council refrained from imposing on states various other substantive requirements of that treaty, in particular its many detailed administrative provisions, most of which relate to the prosecution or extradition of offenders. In principle, however, it would seem that it could have done so, either by making participation in the Convention obligatory rather than optional, or by providing that all the provisions of the Convention (except the final clauses) are binding on all states. That it did not do so is presumably due to political factors such as the reluctance of certain Council members (including the principal sponsor [the United States]) to become so bound.

References removed.

<sup>98</sup> Security Council Resolution 1535 (26 March 2004).

<sup>99</sup> *Supra* note 4. For example, this authority supported the establishment of the *ad hoc* criminal tribunals by the Security Council. See, e.g., *Tadic*, *supra* note 83.

<sup>100</sup> See, e.g., Szasz, *supra* note 71 at 902 fn. 16.

terrorism falls squarely within this authority. Indeed, it may provide a valuable mechanism to address other threats to international peace and security requiring legislative solutions.<sup>101</sup>

The only clear restriction on the nature of Article 41 measures is that they, alone, cannot authorize or require the use of force.<sup>102</sup> The Security Council possesses separate legal authority to require the use of armed force by Members<sup>103</sup> to address threats to international peace and security.<sup>104</sup> Article 42 provides that:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.

This provision vests the Security Council with authority to authorize or require the use of armed force to compel compliance with its decisions.<sup>105</sup> Although it is important to recognize this significant Security Council authority, more detailed legal analysis of its precise scope is unnecessary for the purpose of the present paper.

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<sup>101</sup> Szasz, for example, has argued that:

[t]he members of the Security Council were most likely unaware, when they hastily adopted Resolution 1373, of the pioneering nature of that decision. Now that this door has been opened, however, it seems likely to constitute a precedent for future legislative activities. If used prudently, this new tool will enhance the United Nations and benefit the world community, whose ability to create international law through traditional processes has lagged behind the urgent requirements of the new millennium.

*Ibid.* at 905.

<sup>102</sup> As a result, forceful measures cannot be taken by states for the purpose of enforcing mandatory economic sanctions adopted under Article 41 in the absence of further express authorization to do so from the Security Council.

<sup>103</sup> The UN Charter also envisaged the use of force by the Organization itself, with the Security Council (through a Military Staff Committee) exercising control over military forces made available to it by Members under 'Article 43' agreements. This mechanism has not developed in practice, and as a result the Security Council must act through its Members, acting individually or collectively (through *ad hoc* coalitions, regional arrangements or alliances). See, e.g., Resolution 678, *supra* note 72.

<sup>104</sup> However, while important as a matter of law, this distinction is less relevant in practice, as the Security Council typically does not invoke particular Articles of the UN Charter to support its decisions, relying instead on blanket invocation of Chapter VII.

<sup>105</sup> See, e.g., Security Council Resolution 678, *supra* note 72, authorizing the use of 'all necessary means' to address the Iraqi invasion of Kuwait.

The practical effectiveness of measures adopted Chapter VII does not determine their legality. Their appropriateness remains instead within the discretion of the Security Council. For example, concern over the effectiveness of general economic sanctions has not undermined their legality, though it has led to a practical pressure for the use of targeted sanctions instead. Indeed, the International Criminal Tribunal for the Former Yugoslavia concluded in *Tadic* that “[i]t would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure to achieve their ends”.<sup>106</sup>

### **Limitation and Review of Security Council Decisions**

Despite its dramatic scope, Security Council authority to maintain international peace and security is not unlimited. The UN Charter expressly provides that “[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.”<sup>107</sup> However, this is the only clear limitation on Security Council authority.<sup>108</sup> While this means that the Security Council is generally bound by existing international law<sup>109</sup>, the UN Charter was drafted to avoid its express application to Chapter VII enforcement measures.<sup>110</sup> In any event, as noted above, the Security Council is presumed to act legally, and its authority is not confined to specific and narrow treaty interpretations.

Effectively challenging this presumption of legality is difficult. There is no mandatory judicial oversight of Security Council decision making. The ICJ does not possess this express authority<sup>111</sup>, nor do other UN organs<sup>112</sup>. As a result, even if the ICJ reviews the exercise of

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<sup>106</sup> *Supra* note at 73.

<sup>107</sup> *Supra* note 4, Article 24(2). Use of mandatory language ‘shall’ denotes a legal requirement, as contrasted to more permissive language, such as ‘may’ or ‘should’. The UN Charter identifies ‘Purposes’ in Article 1, cited in full *supra* note 41, and ‘Principles’ in Article 2.

<sup>108</sup> The ICJ in *Namibia*, *supra* note 37 concluded that “[t]he members of the UN have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter 1 of the Charter.”

<sup>109</sup> See, e.g., UN Charter, *supra* note 4, Article 1(1).

<sup>110</sup> See, e.g., Ratner, *supra* note 68 at 592. In 1945, the United States, and other negotiating states, did not want to constrain the ability of the Security Council to respond as necessary to threats to international peace and security. *Ibid.*

<sup>111</sup> Binding ICJ authority is limited to contentious cases arising between UN Members (or other states accepting the Court’s jurisdiction), where those states have expressly accepted the Court’s jurisdiction.

<sup>112</sup> For example, Article 12(2) provides that “[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make

Security Council authority, it is not clear whether the Security Council is bound to follow its decisions.<sup>113</sup> The ICJ has avoided addressing this issue directly, despite recent opportunities to do so.<sup>114</sup> However, it has indicated that it may possess implicit powers of judicial review of Security Council decisions.<sup>115</sup> In any event, even with judicial review, state acquiescence in recent Security Council decisions, including its response to non-traditional threats, suggests that expansive interpretations of Chapter VII will withstand legal challenge.

With or without recourse to judicial review, pursuant to Article 50, individual Members possess the right to request Security Council consultations “with regard to a solution” in the event that Chapter VII measures taken against another state cause collateral “special economic problems” for them.<sup>116</sup> This mechanism has been used to provide financial compensation to third-party states adversely and disproportionately affected by Security Council-mandated economic sanctions.<sup>117</sup>

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any recommendations with regard to that dispute or situation unless the Security Council so requests.” While the General Assembly has taken a permissive view of this provision, it nonetheless limits its legal authority to act as a review mechanism for Security Council decision-making.

<sup>113</sup> Failure to do so might provoke a constitutional crisis within the Organization, however, and this may place practical (though not yet legal) restrictions on Security Council action. Similarly, there is no express review hierarchy within the American Constitution that would allow the Supreme Court to review executive actions. This is now an accepted authority by virtue of the Court’s decision in *Marbury v. Madison*, and its ultimate acceptance by the other organs of American republican government (although this development initiated a short-lived constitutional crisis within the United States). In contrast, however, the Security Council has not indicated a willingness to accept judicial restraints on the exercise of its authority within the UN system, and such overview may not be fully compatible with the exercise of its ‘primary responsibility’.

<sup>114</sup> See, e.g., *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. US)*, Provisional Measures, [1992] I.C.J. Rep. 3.

<sup>115</sup> *Namibia*, *supra* note 37. See discussion in Szasz, *supra* note 71 at 904.

<sup>116</sup> Article 50 provides that:

[i]f preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

*Supra* note 4.

<sup>117</sup> See, e.g., compensation claims made to the Security Council by third-party states with regard to adverse effects resulting from economic sanctions imposed on Iraq in the early 1990s.

## **Security Council Authority: Summary**

Over the last decade, the UN Charter has proven itself a flexible legal instrument permitting a wide range of enforcement action not envisaged in 1945. While mandatory Security Council decisions must address ‘threats to international peace and security’, such characterizations may occur in circumstance far less severe than actual interstate armed conflict, including internal conflict, massive human rights catastrophes or other non-traditional threats to human security, with or without temporal and geographical restrictions. For all intents and purposes, what the Security Council characterizes as a ‘threat to international peace and security’ *is* a ‘threat to international peace and security’, particularly if clear cross-border consequences can be identified and the characterization receives the general support of UN Members. While their precise legal limits warrant further detailed investigation, the non-forceful measures available to the Security Council to react to non-traditional threats are extensive and varied, ranging from economic sanctions through to mandatory domestic legislative requirements. It can establish subsidiary organs to monitor and review state compliance with its decisions. As a last resort, the Security Council may even authorize the use of military force. In all such cases, the measures adopted fall within the discretion of the Security Council to determine.

## **IV. Climate Change and the Security Council**

The Security Council possess unparalleled legal authority to address threats to international peace and security. The following section assesses the extent to which this authority permits the imposition of enforcement measures to address the security challenges posed by climate change. It demonstrates that responses to both the consequences and causes of climate change fit squarely within existing Security Council legal authority.

Climate change was clearly not envisaged in 1945 as a threat to international peace and security falling within Chapter VII. However, this factor is not determinative in assessing current Security Council authority. As noted above, the same statement applies to most of the post-Cold War subjects of Security Council enforcement action, whether civil wars, humanitarian crises or military coups. Security Council responses to these issues have been accepted by Members, and justified by the cross-border or international consequences which bring them closer to traditional security concerns.

As a result, to the extent that climate change fuels actual future inter- or intra-state armed conflict, for example by contributing to destabilizing resource scarcity, the Security Council possesses clear legal authority to take enforcement action to restore international peace and security in the affected region. Such conflicts would fit neatly within more traditional security

understandings, involving clear threats to peace and security with direct and immediate cross-border implications. Mandatory Security Council measures would address specific violent and indirect consequences of climate change, rather than its underlying causes. Exercise of Security Council authority in such circumstances, up to and including authorization of the use of armed force by Members, would not be particularly controversial as a matter of law.

The more interesting - and difficult - legal question is the extent of Security Council authority to address the underlying causes of climate change, to forestall its long-term security ramifications, rather than reacting to its consequences on an *ad hoc* basis. In light of current Security Council practice, future characterization of climate change itself as a threat to international peace and security within the meaning of Chapter VII would not be out of place.<sup>118</sup> Although indirect, its projected security consequences are almost certain to be severe and global, ranging from environmental scarcity to destabilizing refugee flows to the wholesale eradication of the entire territory of sovereign UN Members. Surely, if the international consequences of famine in Somalia or a change in government in Haiti are sufficient to support the invocation of Chapter VII, these clear international threats could justify similar action with respect to climate change. As noted above, numerous national and international actors, within and outside of the UN, already accept that climate change will have dramatic long-term global security consequences. Security Council characterization of climate change as a ‘threat to international peace and security’ will itself be determinative of this issue. The legality of such a determination may not be open to effective challenge within the General Assembly<sup>119</sup> or before the ICJ, but in any event, the clear human, national and international security implications of climate change provide strong objective support for the characterization of climate change as a ‘threat to international peace and security’.

Chapter VII empowers the Security Council to adopt a wide range of enforcement measures following the characterization of climate change as such a threat, from mandatory emissions limitations to requirements for the imposition and enforcement of domestic legislative

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<sup>118</sup> See, e.g., Szasz, *supra* note at 904 (referring to “massive assaults on the international environment”). Indeed, it would not necessarily be unreasonable to support its immediate characterization as such a threat, given the ramifications outlined in Part II, *supra*.

<sup>119</sup> See, e.g., UN Charter, *supra* note 4, Article 12. A General Assembly resolution condemning such a Security Council characterization would be unlikely, in any event, given its strong support for multilateral mechanisms addressing climate change and the need for a 2/3 majority vote in favour of such action. *Ibid.*, Article 18. As early as 1972, the General Assembly recognized “that environmental problems of broad international significance fall within the competence of the United Nations system”. General Assembly Resolution 2997(XXVII)(12 December 1972), Preamble.

environmental measures, along with the authority to punish violators. The choice of specific authorized measures to address this threat would fall within the discretion of the Security Council to determine, in accordance with the Purposes and Principles underlying the UN.

Even if scientific uncertainty remains concerning the specific causes of climate change, and the most appropriate remedies, this would not pose a legal bar to particular Security Council enforcement action. Effectiveness is not a legal requirement for the invocation of enforcement measures. In any event, this would also be consistent with the ‘Precautionary Principle’ delineated in the Framework Convention, which recognizes that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures”.<sup>120</sup> In this context it is worth noting that the causes of climate change appear more obvious than those of terrorism, and measures to address it more easily identified, implemented and enforced.<sup>121</sup>

Given the nature of the problem, addressing climate change may require the implementation of environmental policies on a global scale. It would be within the authority of the Security Council to require state implementation of legislation attacking the causes of climate change, for example through the domestic reduction of greenhouse gas production, even though there is no universally-accepted multilateral treaty upon which to support such legislative measures. As a matter of law, the Security Council does not require preexisting legal principles to support its enforcement measures. However, there is already a substantial legal basis upon which the Security Council might build. Importantly, customary international legal principles already clearly prohibit states from knowingly allowing their territory to be used to cause harm to another state.<sup>122</sup> To date, a problematic legal issue for addressing climate change effects has been

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<sup>120</sup> *Supra* note 1, Article 3(3). See also Rio Declaration on Environment and Development, (1992) 31 I.L.M. 876 [Rio Declaration]. The customary international legal status of the ‘precautionary principle’ remains controversial. See, e.g., Brunnée, *supra* note 5 at 629-630, for a discussion of American resistance to the legal crystallisation of this norm, and its continuing legal ambiguity.

<sup>121</sup> This issue is also addressed in Part V, below.

<sup>122</sup> See, e.g., *Trail Smelter Arbitration*, (1941) 3 R.I.A.A. 1905; and, Rio Declaration, *supra* note 120, Principle 2. See also *Corfu Channel Case, Judgment of 9 April 1949*, 1949 I.C.J. Rep. 4. Indeed, this legal responsibility is acknowledged within the Preamble of the Framework Convention itself, *supra* note 1, which recognizes that:

that States have, in accordance with the Charter of the United Nations and the principles of international law, ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,

the daunting scientific complexity of establishing individual state responsibility for particular environmental consequences in defined geographical areas. The Security Council could overcome this problem by requiring Member action based on the general legal principle prohibiting cross-border environmental harm, recognizing the long-term threat posed to all states by irresponsible use of national territory, and the clear long-term harm of greenhouse gas emissions, despite the absence of direct causal links to particular ‘victim’ states.<sup>123</sup>

While controversial, this would not be out of place in the context of current Security Council practice. Again, an analogy may be drawn to Security Council actions addressing terrorism. Prior to Resolution 1373, there was no clear international legal obligation to curtail terrorist financing in general. While a state could bear international legal responsibility for financing or otherwise supporting a particular attack, directly or indirectly, in the absence of a link to particular and specific harm, a state would not necessarily, or even likely, have attracted legal responsibility for permitting its territory to be used to raise funds for terrorist causes in general. Resolution 1373 altered this balance, requiring states to act against terrorism on the assumption that it would eventually cause harm to some other as yet unidentified state and therefore threatened international peace and security in general. This Security Council action built on years of General Assembly condemnation of terrorism and other less-comprehensive international counter-terrorism measures, as would any Security Council enforcement measures to combat climate change.

It is clear that the Security Council would be within its authority to establish a subsidiary body, such as an ‘Environmental Security Committee’, to oversee the implementation of mandatory climate change measures. It could require periodic state reporting to this body on legislative implementation and emissions reduction. As a matter of law, this body could even be vested with binding authority to conduct intrusive examinations on the territory of particular states to monitor their compliance. Again, while novel in the context of climate change, this is

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A number of threatened island states made declarations at the time of signing the Framework Convention to the effect that by doing so they were not renouncing their legal right with respect to state responsibility for climate change. For example, Nauru declared “its understanding that signature of the Convention shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law.” Framework Convention Ratification, *supra* note 26. Identical declarations were made by Fiji, Kiribati, Papua New Guinea and Tuvalu. *Ibid.* Similar declarations were reiterated by the Cook Islands, Kiribati, Nauru and Niue these states upon signature of the Kyoto Protocol. Kyoto Protocol Ratification, *supra* note 30.

<sup>123</sup> Further support may rest on general legal concepts such as the precautionary principle, although as noted, *supra* note 120, its status as a principle of customary international law remains uncertain.

already a recognized Security Council authority.<sup>124</sup> In addition, the Security Council also possesses the legal authority to impose economic sanctions or other more forceful measures to compel state compliance with such a climate change regime.

Security Council-imposed climate change measures would override other state legal obligations, including free trade requirements within the World Trade Organization or even the voluntary emissions control mechanisms established in the Kyoto Protocol, by virtue of the primacy provisions of Article 103 of the UN Charter.<sup>125</sup> Thus, while the Framework Convention and Kyoto Protocol both reaffirmed the principle of state sovereignty in responding to the threats posed by climate change<sup>126</sup>, this is not a legal bar to adoption of mandatory Security Council enforcement measures.<sup>127</sup>

In summary, the Security Council possesses clear legal authority to respond to both the consequences and causes of climate change as ‘threats to international peace and security’. Remedial measures available to it following such a characterization are extensive, and could include specific greenhouse gas emissions controls and the requirement for domestic legislative enactments. The measures would override other state legal obligations and failure to comply could be subject to punitive enforcement measures.

## V. Legal Authority versus Political Will

Political will of individual Security Council members will be determinative of the ability of this organ to meet effectively the challenges posed by climate change. As the preceding analysis demonstrates, the Security Council possesses sufficient legal authority to address both the causes and consequences of this threat. Whether its individual members chose to exercise this authority in practice remains the crucial ingredient. Again, this paper is not advocating the immediate introduction of Security Council enforcement measures to address climate change.

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<sup>124</sup> For example, delegation of mandatory authority has occurred in the context of the *ad hoc* tribunals for Yugoslavia and Rwanda.

<sup>125</sup> *Supra* note 4. An analogous example in practice is the Chapter VII imposition on Libya of an obligation to extradite the suspected Lockerbie bombers, in Security Council Resolution 748 (31 March 1992), despite the provisions of the 1971 Montreal Convention for the Suppression of Unlawful Acts Against Civil Aviation, 974 U.N.T.S. 178, Article 7, which establish Libya’s choice to extradite or prosecute suspected terrorists. Discussed in Ratner, *supra* note 68 at 601-602.

<sup>126</sup> See, respectively, *supra* note 1, and *supra* note 2.

<sup>127</sup> As Ratner notes, Chapter VII and Article 103 give the Security Council “the ability to alter the international legal landscape instantaneously.” *Supra* note 68 at 592.

However, it is nonetheless important to begin to address the practical impediments to such actions, in addition to determining their legal basis. Recognizing that further research in this area is required, this section addresses some of the challenges which may arise in the context of Security Council action, and offers some tentative solutions, building in particular on the Security Council's counter-terrorism experiences.

As outlined above, substantive Security Council decision-making requires the 'affirmative vote of nine members, including the concurring votes of the permanent members'. Overcoming this threshold will be a key challenge for any Security Council action to address the threats posed by climate change. In particular, the support (or neutrality) of the P5 is of fundamental importance, and cannot be taken for granted.<sup>128</sup> Unless this threshold is reached, the Security Council will simply not be able to act.<sup>129</sup>

Initial concerns exist with respect to the current commitment of permanent members to address the causes and consequences of climate change. While all P5 states are parties to the Framework Convention<sup>130</sup>, only 4 have ratified the Kyoto Protocol<sup>131</sup>. Although a signatory, the United States has strongly resisted ratification.<sup>132</sup> Nonetheless, all permanent members, including the United States, have recognized the long-term international threats posed by climate change. American reluctance to join a particular treaty regime to address this threat should not be equated with hostility to other potential measures resting on similar principles, and the United States has in fact worked to curb the effects of climate change in other fora.<sup>133</sup> In any event,

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<sup>128</sup> Szasz notes generally that in the context of Security Council legislative action, the permanent members "will naturally in the first instance protect their own perceived interests, whether of a political or a legal nature (e.g., resisting international legislation that might conflict with constitutional requirements). They are also likely to protect the interests of close allies". *Supra* note at 905.

<sup>129</sup> In the event of Security Council paralysis, there may be authority for the General Assembly to act pursuant to its 'secondary' responsibility to maintain international peace and security. However, this is beyond the scope of this paper. In any event, the General Assembly does not possess coercive authority to compel Member remedial action to address international threats.

<sup>130</sup> Framework Convention Ratification, *supra* note 26.

<sup>131</sup> Kyoto Protocol Ratification, *supra* note 30.

<sup>132</sup> Indeed, the United States under President George W. Bush has actively opposed this treaty regime. See, e.g., Brunnée, *supra* note 5 at 645.

<sup>133</sup> See, e.g., Brunnée, *supra* note 5. For example, President George Bush argued in 2001 that "America's unwillingness to embrace a flawed treaty should not be read by our friends and allies as any abdication of responsibility. To the contrary, my administration is committed to a leadership role on the

failure to ratify the underlying treaty is not (necessarily) determinative of a state's position with respect to the same issue before the Security Council. For example, adoption of Resolution 1373 occurred when only 1 permanent member (the United Kingdom) had ratified all UN counter-terrorism conventions and protocols.<sup>134</sup> However, achieving P5 consensus will remain a crucial threshold issue for Security Council action to address climate change.

To the extent that actual inter- or intra-state armed conflict results from environmental factors, Security Council legal authority is well-established and the threat to peace and security immediate and obvious. Harnessing the political will necessary to respond these isolated violent consequences of climate change should therefore be no more difficult than responding to any other immediate security threats. Nonetheless, substantial political limitations to enforcement action may arise as a result of the location and strategic importance of the conflict in question. For example, enforcement measures cannot reasonably be expected in the context of any conflict to which a permanent member is a party. Significant P5 economic or political interests may also prevent effective enforcement action in conflicts involving other states.<sup>135</sup> Where the use of armed force is contemplated, securing sufficient troop contributions and logistical support will be further practical concerns, factors which have already delayed or prevented forceful Security Council responses to numerous conflicts to date.<sup>136</sup> Nonetheless, Security Council responses to environmentally-fueled or -exacerbated conflict will fit within a well-established organizational pattern.

Much more difficult will be generating sufficient support for the exercise of the Security Council's legal authority to address the underlying causes of climate change. Militarized threats and immediate cross-border consequences remain the principal focus of the Security Council in

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issue of climate change." The White House, "President Bush Discusses Global Climate Change," 11 June 2001 <<http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html>> cited in Brunnée, *ibid* at 618. However, within the United States significant opposition across the political spectrum remains with respect to multilateral institutional responses founded on binding international legal principles, which will make comprehensive international legislative responses to climate change more difficult. See, e.g., *ibid.* at 641ff. However, it is worth noting that such opposition did not prevent a legislative response to international terrorism by the Security Council.

<sup>134</sup> Rosand, *supra* note 89 at 337 fn. 30.

<sup>135</sup> For example, it appears that Security Council responses to the humanitarian crisis in Darfur have been hampered by the economic interests of China and Russia in Sudan.

<sup>136</sup> See, e.g., Hampson, *supra* note 3 at 127-138, discussing the practical impediments to responding with establishing a UN-authorized force to address the humanitarian disaster in the Democratic Republic of Congo (Zaire) in 1996.

practice, despite recent conceptual expansion of Security Council interventionism. Moving beyond this framework to address non-military challenges in a meaningful and effective manner remains novel, and its difficulties should not be underestimated. Indeed, the issue of environmental threats as ‘threats to international peace and security’ was raised before the Security Council in 1989 by the United Kingdom, and rejected on the basis that it expanded the concept so far as to render it meaningless.<sup>137</sup> However, the dramatic post-Cold War philosophical shift in the Security Council suggests at least the potential for revisiting this decision, particularly in light of the growing recognition of HIV/AIDS as a potential threat to international security. Indeed, with climate change the global security implications are arguably much clearer than those resulting from the HIV/AIDS pandemic, where the threat is generally confined to a particular region and where cross-border consequences are even less direct.<sup>138</sup>

In fact, there are also significant practical factors that would suggest that climate change may be a more suitable subject for effective Security Council enforcement action than either terrorism or HIV/AIDS. The causes of terrorism are less certain than those of climate change, where enforcement measures may be directed at scientifically-determined risk factors. These factors are generally within effective state regulatory control. Unlike terrorism, the agents contributing to climate change are typically (more or less) willing subjects of state regulation, namely businesses and individual citizens, over which states exercise significant practical control. Terrorists, on the other hand, generally operate wholly outside of the state regulatory framework, and often in direct conflict with it. Asking states to regulate their behaviour is correspondingly more difficult, as indicated by the challenges to date of addressing terrorism through national and international financial mechanisms.<sup>139</sup> Similarly, effectively addressing the causes of HIV/AIDS through the Security Council will be exceedingly difficult. While promotion of safe sex practices

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<sup>137</sup> See David M. Malone, “Introduction,” *The UN Security Council: From the Cold War to the 21<sup>st</sup> Century*, (Boulder, Co.: Lynne Rienner, 2004): 1-15, at 14 fn. 21, illustrating “[h]ow far the Council’s agenda has opened up to non-traditional issues” in the intervening years.

<sup>138</sup> The security implications of climate change are certain to be severe, as outlined earlier. Should Security Council action be warranted in future, it will be incumbent upon other states and international civil society to make a compelling case for enforcement action under Chapter VII. Pressure can be successful, as witnessed with the placement of HIV/AIDS on the Security Council agenda as a potential threat to international peace and security.

<sup>139</sup> See, e.g., Bantekas, *supra* note 76 at 315, noting that the “novel measures” imposed by Resolution 1373 and subsequent resolutions “exposed the inadequacy of domestic and international financial systems in dealing with terrorist funds, although the problem was not unknown.”

may fall within state health and education mandates, the actual practice of sex is clearly not subject to effective state regulation.

Ironically, however, the link with state-regulated activities may also suggest some difficulties for building future political support in favour of Security Council action to combat climate change. Curtailing greenhouse gas production may result in significant short-term costs to polluting industries. As a result, the perceived national economic interest of states may be affected by climate change measures adopted by the Security Council. The economic interests of (most) states are not negatively affected to the same degree by counter-terrorism measures, although these have placed significant burdens on some domestic private actors, in particular in the banking and financial sectors.<sup>140</sup>

The Security Council has at least two mechanisms available to offset the worst such effects. A broad reading of Article 50 of the UN Charter would permit Security Council compensation of states disproportionately affected by enforcement measures to combat climate change.<sup>141</sup> Additionally, it can impose varying levels of legal and practical obligations on states, recognizing their specific economic interests and contribution to climate change. That is, there is nothing to prevent the Security Council from maintaining in its enforcement measures the “common but differentiated responsibilities” recognized in both the Framework Convention<sup>142</sup> and its Kyoto Protocol<sup>143</sup>.

Indeed, in its early practice the CTC recognized varying levels of state capacity to implement Resolution 1373, despite the legally-uniform obligations established through this mechanism.<sup>144</sup> This relative approach by the CTC garnered significant early support by UN

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<sup>140</sup> *Ibid.* at 330-333. Comprehensive Security Council response to HIV/AIDS may also raise economic issues, should it impact the intellectual property interests of major pharmaceutical corporations.

<sup>141</sup> *Supra* note 4. Article 50 expressly applies only to third-party states ‘confronted by special economic problems’ resulting from ‘preventive or enforcement measures against any state’. Strict reading might lead to two difficulties. First, the disproportionately affected state may itself be subject to universal enforcement measures, and therefore not a third-party. Second, these measures are not taken against ‘any state’ but to address a global problem. Nonetheless, in keeping with a broad reading of Security Council authority, economic assistance to states disproportionately affected by climate change measures would not be out of place, whether through a purposive reading of Article 50 or as a result of general Security Council Chapter VII authority.

<sup>142</sup> *Supra* note 1, Preamble.

<sup>143</sup> *Supra* note 2, Article 10.

<sup>144</sup> Rosand, *supra* note 89 at 335. Adopted only two weeks after the terrorist attacks of 11 September 2001, Resolution 1373 did not define the precise counter-terrorism role of the CTC or its procedure.

Members. It built on three general principles, transparency, dialogue and consensus, and helped the CTC to build the political will necessary to actually implement the Security Council's decision in practice.<sup>145</sup>

Although Resolution 1373 exposed the clear inadequacy of existing international networks combating terrorism<sup>146</sup>, in its immediate aftermath state compliance was exceptional. Most states filed their initial counter-terrorism report quickly, including accused terrorist sympathizers and other pariah states such as Iran, Iraq, Libya and North Korea.<sup>147</sup> By early 2003, virtually all UN Members had filed at least one report, and most had already also responded to specific concerns raised by the CTC relating to their initial report.<sup>148</sup> These reports indicated significant state revision of domestic counter-terrorism legislation and substantial increases in ratification of relevant international treaties.<sup>149</sup> In addition to fostering bilateral capacity building cooperation<sup>150</sup>, the CTC built relationships with other organizations involved with counter-terrorism activities, becoming "the hub of a global, long-term effort to combat terrorism."<sup>151</sup>

Compliance with Resolution 1373 has subsequently waned, although in part this may illustrate capacity issues rather than opposition, given the onerous reporting and implementation requirements imposed by the Security Council.<sup>152</sup> The Security Council established the CTED in 2004 in an effort to revitalize this process. In doing so, the Security Council specifically recognized a requirement for physical inspection capacity, in addition to facilitating bilateral

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Instead, this was defined through the early practice of the CTC, and was heavily dependent on its first chairman, Sir Jeremy Greenstock, British Ambassador to the UN. *Ibid.*

<sup>145</sup> Rosand, *supra* note 89 at 335.

<sup>146</sup> Bantekas argues that the measures imposed by Resolution 1373 "revealed a lack of coordination between states themselves and between states, intergovernmental organizations, and private financial institutions." *Supra* note 76 at 315.

<sup>147</sup> Bantekas, *ibid.* at 326; Rosand, *supra* note 89 at 337.

<sup>148</sup> Rosand, *ibid.* at 335.

<sup>149</sup> Rosand, *supra* note 89 at 337.

<sup>150</sup> For a discussion of early bilateral assistance efforts see, *e.g.*, Bantekas, *supra* note 76 at 327.

<sup>151</sup> Rosand, *supra* note 89 at 338.

<sup>152</sup> High-level Panel, *supra* note 22 at ¶153, 155. However, as Rosand notes, non-confrontational approaches may facilitate compliance by states that are willing but unable to comply, but likely not with unwilling states. *Ibid.* at 336.

capacity-building between states. Although this signals a shift away from the non-confrontational foundations of the CTC, the Security Council nonetheless provided that such inspections must continue to rest on state consent. To date, this practice has not surprisingly focused on states where serious terrorist concerns exist. Significant practical concerns remain, however, in particular limited institutional resources, capacity-building capacity, continuing emphasis on written reports for most states and the need to maintain comprehensive state support.<sup>153</sup>

A similar inspection and capacity-coordinating function could be assigned to an Environmental Security Committee established pursuant to Chapter VII authority to address climate change. Indeed, in addition to establishing a role facilitating bilateral assistance between Members, the Security Council could also vest such a body with direct capacity-building responsibilities and resources.<sup>154</sup> Such a body could provide “coherence in environmental protection efforts at the global level”, an existing gap highlighted by the recent UN High-level Panel report, building on and coordinating the work of multinational organizations addressing specific aspects of the threats posed by climate change.<sup>155</sup> Particularly with respect to fostering early state compliance, the lessons of the CTC and CTED will be instructive, including the need for transparency, dialogue and consensus.<sup>156</sup> While the structure and authority of such a body requires significant further analysis, there is no doubt that it would rest upon a solid legal basis if established as an enforcement measure under Chapter VII of the UN Charter.

To the extent that legislative or institutional mechanisms are adopted to address climate change, political rather than legal concerns will dictate their success. Szasz notes that legislative mechanisms should not generally be adopted in the absence of the “general will of the world community, as expressed by the General Assembly,” although recognizing that this is not

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<sup>153</sup> See, e.g., Rosand, *supra* note 89 at 338-341. Although Rosand raised these concerns with specific regard to the CTC, prior to the establishment of the CTED, they remain valid. High-level Panel recommendations include vesting further authority in CTED to facilitate bilateral counter-terrorism assistance and provide further support to states through a counter-terrorism “capacity-building trust fund”. *Supra* note 22 at ¶153-154.

<sup>154</sup> See, e.g., the International Civil Aviation Organization and the International Maritime Organization, both UN specialized agencies with direct capacity building responsibilities and resources.

<sup>155</sup> *Supra* note 22 at ¶54. The High-level Panel also noted that to date “[m]ost attempts to create governance structures to tackle the problems of global environmental degradation have not effectively addressed climate change, deforestation and desertification.” *Ibid.*

<sup>156</sup> As identified by Rosand, *supra* note 89 at 335ff, and discussed above.

required as a matter of law.<sup>157</sup> In the absence of such support, enforcement will be virtually impossible. In contrast, general international approval will strengthen Security Council pressure on reluctant states.<sup>158</sup> The experiences of the CTC and CTED certainly suggest that universal Chapter VII enforcement measures must rest on the consent of most states, in practice, despite its absence as a formal legal requirement.

Although beyond the scope of this paper, ongoing efforts to restructure the Security Council may vest this organ with greater political legitimacy with which to address non-traditional security threats such as climate change.<sup>159</sup> However, there is some concern that any such process may also inhibit the “prompt and effective”<sup>160</sup> exercise by the Security Council of its primary responsibility for the maintenance of international peace and security. While any reform may actually slow the political process of adopting Chapter VII resolutions, resulting increases in Security Council legitimacy may strengthen post-adoption compliance rates.<sup>161</sup>

## VI. Conclusion

In 2000, UN Secretary-General Kofi Annan recognized that non-traditional security challenges “require us to think creatively, and to adapt our traditional approaches to better meet the needs of our new era.”<sup>162</sup> This is especially true for the Security Council, given its primary responsibility within the UN to maintain international peace and security. While the past decade has witnessed substantial and necessary institutional adaptation to new security challenges, ongoing creativity may be required to respond to the clear long-term threats posed by global climate change.

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<sup>157</sup> *Supra* note 71 at 905.

<sup>158</sup> *Ibid.*

<sup>159</sup> For more information on ongoing efforts to reform the structure of the Security Council see, *e.g.*, the High-level Report, *supra* note 22 at ¶244-260; and, *In larger freedom*, *supra* note 10 at ¶167-170.

<sup>160</sup> Article 24(1).

<sup>161</sup> Current disproportionate representation of developed states on the Security Council, particularly within the P5, may cause concern over the balance struck between environmental concerns and state economic development, in particular with respect to the equity of the ‘common but differentiated’ burden-sharing mechanisms.

<sup>162</sup> *We the Peoples: The Role of the United Nations in the 21st Century*, Millennium Report of the Secretary-General, UN Doc. A/54/2000, 3 April 2000 <<http://www.un.org/millennium/sg/report/full.htm>> at ¶197.

The Security Council possesses the legal authority to impose mandatory remedial measures to address climate change, should its members decide to invoke it. Clearly, Chapter VII enforcement measures remain an extreme response to this complex issue, and this paper does not advocate their immediate adoption. However, current voluntary international measures to address climate change may prove inadequate, and it is important to assess the merits of other options, including their legal and political limitations, in order to respond effectively should the need arise. This paper has begun this dialogue, illustrating that the Security Council has the authority to act to address both the causes and consequences of climate change and suggesting mechanisms through which this authority might be directed. While the establishment of an 'Environmental Security Committee' to oversee domestic greenhouse gas reductions is one option, further attention is warranted regarding potential Security Council responses to climate change.

Parallels with the global response to terrorism are striking. The international character of the terrorist threat has been known for decades, but throughout the latter half of the twentieth century, multilateral responses foundered on interrelated questions of national interest and difficulty defining the problem with precision.<sup>163</sup> Prior to 2001, the Security Council adopted an *ad hoc*, incident-specific approach to this threat, if it responded at all. The disastrous insufficiency of these multilateral and institutional responses was illustrated on 11 September 2001. Since then, the Security Council has imposed a comprehensive blanket of remedial counter-terrorism measures, building on multilateral treaties addressing particular aspects of the general problem. These 'hastily adopted' measures set a precedent that will prove valuable for addressing other non-traditional threats<sup>164</sup>, while also illustrating the practical difficulties involved with implementing legislative solutions to global problems. Given the dramatic human security implications of climate change, it must not take an actual crisis to prompt further investigation of the measures available to the Security Council to address this emerging threat to international peace and security.

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<sup>163</sup> See, e.g., Bantekas, *supra* note 76 at 315.

<sup>164</sup> Szasz, for example, has argued that:

[t]he members of the Security Council were most likely unaware, when they hastily adopted Resolution 1373, of the pioneering nature of that decision. Now that this door has been opened, however, it seems likely to constitute a precedent for future legislative activities. If used prudently, this new tool will enhance the United Nations and benefit the world community, whose ability to create international law through traditional processes has lagged behind the urgent requirements of the new millennium.

*Supra* note 71 at 905.