LEGITIMATIZING UN SECURITY COUNCIL AS LEGISLATOR —THE CONSTITUTIVE AND SOCIO-POLITICAL RATIONALE

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Abstract

International legal scholars of the UN law have more often than not been amazed by the legislative resolutions adopted by the UN Security Council. This role taken by the Council is rather new, and in-depth theoretical and practical analyses thereof have been found wanting and many fundamentals therein perplexing. For example, constitutively, although there are some good discussions around well-known legislative resolutions like Resolutions 1373 (count-terrorism) and 1540 (non-proliferation), no authors have written about what a legislative resolution is and what elements exactly make such a resolution "legislative." The prevailing trend is to take for granted this "using-your-gut" way of claiming a resolution to be legislative. This barrier makes it objectively implausible to legitimatize or illegitimatize the Council's new role in the first place, which further makes future review and regulation of these "so-called" legislative resolutions unachievable. Also, international legal scholars usually investigate this topic merely from a legal perspective, while little attention has been paid to settling this legal issue against a backdrop of the Council and the UN as a tactfully synthesized international society constituted by individual political components, i.e., Member States. To fill in the gaps mentioned above, this article adopted a historically and jurisprudentially comparative approach to deconstruct legislative resolutions. It unprecedentedly deducted a straightforward formula with dissected elements to hand-pick legislative resolutions. This article also went a step further with sociopolitical reasoning to provide theoretical and practical rebuttals to the voices that tried to illegalize this new role, offering a heavier layer of sociopolitical probing beneath the surface of the common legal rationale.

Keywords: Legislative Resolutions; UN Security Council; UN Lawmaking

I. INTRODUCTION

The UN Security Council ("the Council") has long been regarded as primarily responsible for maintaining international peace and security. The powers granted to the Council by the UN Charter, particularly those in Chapter VII seem to be indubitably unparalleled. The early 1990s, branded by the end of the Cold War, witnessed exponential and proactive engagement by the Council in the international governing arena. While the Council released routine resolutions that enshrined its predominance within the UN decision-making parameters with regard to specific disputes and circumstances, resolutions with very generic and abstract characteristics have been successively adopted in the New Millennium.

Adoption of these resolutions attracted international attention and has made the Council assume the title of legislator. Legal researchers have been showing an increased and prolonged interest in the legality and legitimacy of this role of "global legislator,"[1] and they have raised various questions and discussions about the possible outcomes and restraints with regard to this Council's newly acquired role. Despite long-term debates, many of the core issues pertaining to the problem still remain unsolved or untouched, which, in turn, fragments the overarching understanding of the topic. For instance, there is a debate surrounding the accurate definition of "legislative resolution" and far too little attention has been paid to the practical analyses of such a role.

Therefore, substantively, this article tries to provide a more rigorous overview of contributive intellectual theses, and to fill the "insidious gaps" within the existing scholarly context, so as to legitimize the legislative role of the Council. However, it also maintains that such an international legislative power should never be seen as unfettered, by deliberating over the UN Charter and reiterating various international obligations involved in this type of international legislation at large through its establishment of a restrictive contour and a plausible remedy framework.

Procedurally and methodologically, this article will expound on the Council's legislative role against its sociopolitical background. It will encompass both theoretical and practical analyses in order to compose a "pragmatic" legal approach to clear up the current confusion. As the Council itself is a distinct political organ in the UN system, it is unavoidable to take certain functional political elements into consideration.[2] Any use of such a hybrid approach will not be regarded as *de facto* approval of power politics, but rather a comprehensive investigatory legal study of academic value.[3] This article tries to explore a deep understanding that may help the Council fulfill its legitimate running and effectivity. However, this also calls for a further outlook for a reformed "checks and balances" system within the Council, which will also be discussed in the following parts.

Part II begins by briefly introducing the rudimentary functions of the Council, whereas the essentials of the new legislative role will follow and be contemplated in detail. The basic questions of what, how and why should be dealt with in the critical assessment of the problem. When discussing the "what" aspect, whilst abundant research has been carried out on the examination of such a type of legislation, there has been very little understanding of what a legislative resolution really is. This part, among others, offers a clear-

[1] *See* Eric Rosand, *The Security Council as Global Legislator: Ultra Vires or Ultra Innovative*, 28 FORDHAM INT'L L. J. 542, 544 (2005).

[2] *See* Hans Kelsen, *Organization and Procedure of the Security Council of the United Nations*, 59 Harv. L. Rev. 1087, 1121 (1946).

[3] *See* Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 EUR. J. INT'L L. 881, 887 (2006).

cut definition. Apart from strictly legislative resolutions, there has also been a rising trend in the Council to deploy soft legislative resolutions to practical effect; these two constituents will complete the "how" aspect. Finally, the "why" analytical section of the part will address why such legislative resolutions are necessary.

Part III presents the mainstream dissenting voices refuting the Council's new role as a legislator. Yet the rebuttals may be both possible and likely, they do not negate the claim that the Council can and ought to act as an appropriate legislator like such. On the contrary, the discussions here may even further fortify the legitimacy and legality of the Security Council legislation ("SC legislation"). This part will show that many of these contentions are proposed from a non-neutral premise and ignore the counterarguments, thus, making the generalization unconvincing and problematic. Although ascertaining these voices is helpful in providing different facets of the problem that is being examined, these arguments may fail to impair the overall merit of SC legislation.

Part IV overviews and categorizes the legislative resolutions issued by the Council, and investigates the implementation of these resolutions both in regions and within individual Member States.[4]

Part V discusses the scope of the SC legislation under the UN Charter and general international law, and thus from both the procedural and the substantive perspectives answers the question of how a legislative resolution maintains its legality from adoption to enforcement. This part also puts forward possible remedies, including the motion of a more developed review mechanism to bring the SC legislation under better control.

II. UNITED NATIONS SECURITY COUNCIL CROWNED LEGISLATOR

A. Rudimentary Functions of the Council

There is a large volume of published studies describing the functions of the Council, but gradually it should be noted that the enumerating list seemingly can never be exhaustive.[5] Such ambiguity partly results from the evolution of the Council's role, whether trivial or consequential, and is well worth some historical analyzing. Different from other governing bodies of that kind, the first meeting of the Council was held in Church House, London, close to Westminster Abbey and the bomb-scarred Houses of Parliament around 3 p.m. on Thursday, 17th January 1946 and it was not disciplined. When examining the

[4] Capitalized initials in "Member States" refer to the Member States of the United Nations only. Members of the Council will be written in the formats of "member States" or "members".

[5] *See* Nicholas Tsagourias, *Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity*, 24 LEIDEN J. INT'L L. 539, 542 (2011).

eleven members[6] of the Council at that time, one may find that the composition of the representatives chosen by these countries was rather political: chiefly, diplomats and high-rank politicians.[7] Due to their professional nature, these political elites preferred vague demarcations to black-and-white demonstrations. Then the safest and most authoritative definition became the overarching Article 24(1) of the UN Charter, where the texts may hardly be interpreted with any counter-legislative air:

> "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

Notwithstanding the foreseeable difficulties outlined above, there was an attempt to more practically define the Council's function. A conceptual division into three functions was proposed: recommendations to the parties to a dispute, recommendations to the General Assembly ("the Assembly"), and mandatory (binding) decisions.[8] Among these three, the binding decision-making function is the most important function. It was underpinned by two distinctive sets of powers distinguishing the Council from others, namely the power to make bind-ing decisions itself and the authority under Chapter VII in the enforcement of that bindingness through Articles 41 and 42.[9]

To fully understand the functions of the Council, it is also useful to understand the differentiating characteristics of the Council. Wood pointed out the three principal features of the Council: its "limited memberships," "a limited but important field of activity," and "power to impose legal obligations on all members of the United Nations."[10] Apart from this, there are three more facts about the Council worth mentioning. The first fact is that the limited Council members are representing all UN Member States; the second fact is that the responsibilities taken on by the Council should carry the characteristics of continuity and stability ("at all times"); the third fact is the Council's independent discretionary power in deciding its own rules of procedure.[11]

Together these views in the literature provide important insights into a final conclusion: The Council, working on behalf of all UN Members, is a miniature forum that fulfills its Article 24 (1) role by imposing binding decisions upon

[6] Australia, Brazil, Egypt, France, Mexico, Poland, the Netherlands, the former Republic of China, the Soviet Union (the Russian Federation), the United Kingdom, and the United States.

[7] *See* SYDNEY D. BAILEY & SAM DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL 2 (3rd ed., Oxford: Clarendon Press 1998).

[8] *See id*., at 18.

[9] *See* THE UN SECURITY COUNCIL IN THE TWENTY-FIRST CENTURY 3 (Sebastian von Einsiedel et al. eds., Boulder, Colorado: Lynne Rienner Publishers, 2016).

[10] Michael Wood, *Security Council Working Methods and Procedure: Recent Developments*, 45 INT'L & COMP. L. Q. 150, 152 (1996).

[11] *See* BAILEY & DAWS, *supra* note 7, at 4-5.

any Member States and making recommendations affecting the external State Parties or other UN organs internally.

Daily activities of the Council include: surveying the State/non-State actions, initiating collective non-recognition, imposing arms embargoes, disarmament and social, economic, or diplomatic measures, granting authorizations for the use of force, making reparation assessments, and establishing tribunals.[12] It also launches investigations, mediations and ceasefire directives, appoints special envoys, formulates principles of peaceful agreements, implements various peacekeeping missions and dispatches military observers.[13] Examples could be used as indicators to bring some realistic comprehensions of its spheres of activity, to facilitate and support the theoretical foregoing analyses. However, as mentioned, the specific function list of the Council may never be exhaustive.

In light of the above, one may feel surprised at the diverse tasks the Council undertakes and the lack of a detailed, express, and unequivocal statement to determine whether it is acting within its scope. Although there is much debate when inspecting the UN Charter, no evidence therein has shown that the Council cannot take on the role as a legislator. Compared with the various activities listed and their effortless acceptance in the international community, the answer to the legislating role should be a yes, no matter how *prima facie* it may be. As the door has been opened, this study will progress in order to reach the core of the issue.

B. Discerning the Council's Legislative Role

To facilitate the understanding of the Council's legislative role, it is important to understand what legislation looks like at the Council level. It is not difficult to describe the concept of legislation using a domestic legal vocabulary. A legislator takes up its legislative role when making a law that imposes both general and binding obligations to all actors under its jurisdiction. It should be admitted that indiscriminately applying domestic definitions to an international context can be misleading, but using fundamental concepts as such will not radically change the intended meaning and could still add value. A simplified version could be used introductorily, which refers to legislation of international characteristic as creating binding laws that "establish obligations of a general and abstract nature and for an open-ended range of addressees over time."[14] Therefore, all types of legislative acts within the sphere of inter-

[12] *See* Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT'L & COMP. L. Q. 55, 56 (1994).

[13] *About the United Nations Security Council*, UNITED NATIONS SECURITY COUNCIL, http://www.un.org/en/sc/about/ (last visited Feb. 24, 2020).

[14] Jutta Brunnée, *International Legislation*, MAX PLANK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Oct. 2010), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1429 (last visited Feb. 25 2020).

national legislation will unavoidably fall into the premises of three determinative pillars: binding obligation, abstraction and generality.[15]

These pillars to uphold legislation have already reached almost the degree of consensus in an earlier time.[16] Despite the fact that the meaning of "SC legis-lation" was largely ignored, intentionally or unintentionally, by the academia, the divergence in the existing, limited studies makes the issue harder to tackle. Also, it should be noted that SC legislation is the equivalent of legislative re-solutions adopted by the Council. Other forms of documents from the Council, be it presidential statements or other recommendations, are generally non-bind-ing.[17] Therefore, it is not an exaggeration to infer that a resolution is the only possible channel to use for an SC documentation to become externally legis-lative.

The pillar of binding obligation in categorizing a legislative resolution of the Council into SC legislation is the first hurdle. There are two main questions to be solved: Firstly, does a legislative resolution have to be a Chapter VII resolution? Secondly, what kind of language should be used to identify relevant legislative provisions within a resolution?

There is a common recognition that the resolutions explicitly adopted under Chapter VII are generally considered legally binding.[18] Some authors even argue that all resolutions should be considered binding by virtue of what Article 25 articulated[19] – "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Spontaneous application of Article 25 to make a resolution binding is not preconditioned by adoption under Chapter VII.[20] Other authors insisted that resolutions under Chapter VII carrying certain characteristics are legis-

[15] *Cf.* Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 176 (2005).

[16] *See* Brunnée, *supra* note 14.

[17] *See* Michael Wood, *United Nations Security Council*, *in* MAX PLANK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Jul. 2007), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e561 (last visited Feb. 25, 2020).

[18] *See* Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), [1962] ICJ Rep. 151, at 163; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (hereinafter "Wall"), [2004] ICJ Rep. 136, at para 26.

[19] *See* Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT'L L. 879, 885 (2006); Einsiedel et al., *supra* note 9; Rosalyn Higgins, *The Advisory Opinion on Namibia: Which UN Resolutions Are Binding Under Article 25 of the Charter?*, 21 INT'L & COMP. L. Q. 270, 286 (1972); Dan Joyner, *Legal Bindingness of Security Council Resolutions Generally, and Resolution 2334 on the Israeli Settlements in Particular*, EJIL: TALK! (Jan. 9, 2017), http://www.ejiltalk.org/legal-bindingness-of-security-council-resolutions-generally-and-resolution-2334-on-the-israeli-settlements-in-particular/ (last visited Feb. 25, 2020).

[20] *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, [1971] ICJ Rep 16, at paras. 113, 115.

lative.[21] Judge Owada balanced this trade-off by saying that Article 25 "in theory" constitutes a general collective binding agreement amongst Member States whereas it "in substance" gives no *a priori* specific consent to a particular matter; Despite these comments, the Judge did not side with either party in the debate.[22]

The second question was raised against a backdrop of the court's inability to determine the binding/non-binding legal effect of a resolution,[23] and in support of the argument that the wording of the resolution concerned, be it a "shall," a "may,"[24] etc., could be regarded as the only evidence of whether the resolution is binding or not. In addition, there are no appropriate bodies that can interpret the Council's resolution besides the Council itself.[25] Various researchers have tried to understand the historical context of the drafting of the resolution to decide whether the particular terminology mentioned was primarily designed as binding by the Council. For this reason, attempts have been made to develop a terminology pyramid – "decides" and "requires" may be deemed as binding indicators, whereas "invites" and "urges" are non-binding; words like "calls upon" and "endorses" remain in grey.[26]

Despite the above research, a political frame always offers the most applicable and efficient solution that, either explicitly or implicitly, serves a combined end, and this is the approach taken by this article to answer the two questions just mentioned. This approach invokes some reflections: First, the political elites in the Council will not choose to omit the chapeau of "Chapter VII" when they unanimously intend to create a legally binding resolution. Second, they will not replace the use of the most unambiguous word "decides" with some controversial counterparts if they intend to put binding force upon the clause. From both a theoretical and a practical point of view, hesitation and disagreement within the Council about the bindingness of a resolution is the only explanation for these binding vocabularies (the "Chapter VII" chapeau and the terminology "decides") to be omitted. As the French representative commented, only the decisions "within the framework of Chapter VII of the Charter and have been adopted as a result of the establishment of threats to the peace,

[21] *See* Vera Gowlland-Debbas, *Security Council Change*, 65 INT'L J. 119, 125 (2009); Alex C. Castles, *Legal Status of U.N. Resolutions*, 3 ADEL. L. REV. 68, 71 (1967); Bianchi, *supra* note 3, at 883; Luis Miguel Hinojosa Martinez, *The Legislative Role of the Security Council in Its Fight Against Terrorism: Legal, Political and Practical Limits*, 57 INT'L & COMP. L. Q. 333, 336 (2008).

[22] *See* Hisashi Owada, *Problems of Interaction Between the International and Domestic Legal Orders*, 5 ASIAN J. INT'L L. 246, 256 (2015).

[23] *See* Öberg, *supra* note 19, at 892.

[24] *See* Kelsen, *supra* note 2, at 1110.

[25] *See* Michael Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. OF U.N. L. ONLINE 73, 82-85 (1998).

[26] See *Security Council Action Under Chapter VII: Myths and Realities*, SECURITY COUNCIL REPORT (Jun. 23. 2008), http://www.securitycouncilreport.org/special-research-report/lookup-c-glKWLeMTIsG-b-4202671.php (last visited Feb. 25, 2020).

as required by Article 39"[27] will be binding. Therefore, we could reasonably conclude that only wording under the "Chapter VII" chapeau with an identifiable determiner "decides" will impose a binding obligation required by the first pillar of our legislation analysis.

The other two pillars, as previously mentioned, are abstraction and generality. The use of these two words is commonplace, but the explanation of the true meaning of the two is complicated. More often, these two terms are used without any further explanation, and the questions of why it should be used in a particular circumstance and what the word stands for seem to be a philosophical inquiry that runs beyond the reach of legal studies. However, that perception is unconvincing and tricky. For an accurate understanding real meaning of the wording, a definition should be the premise.

There is an endeavor that interprets abstraction as the signifier of application in "an unlimited number of cases," whilst generality as the symbol of addressing "an unlimited number of subjects."[28] From this viewpoint, it is easy to understand the aspect of abstraction, but doubts concerning the aspect of generality have yet to be properly eliminated. Seemingly, nearly all the previous mainstream studies, including the one above, equate generality with an unlimited number of addressees.

These simplifications, although convenient, are nevertheless questionable. Firstly, it is important to recognize that there are usually two groups of addressees involved in a legislative dialogue, and they influence both the abstraction and the generality pillars. One is the group to whom the resolutions are directly addressed (in this case, all Member States, the genuine "*Subject*"); the other is the flock to whom the content of these resolutions is addressed or stipulated indirectly (the "*Object*"). Following this division, to make a resolution legislative both the "*Subject*" and the "*Object*" need to be unspecified and open-ended. The "*Object*" here could be logically connected with the pillar of abstraction, requiring a resolution's applicability in "an unlimited number of cases." Secondly, there may also be possible situations that lack a personified "*Object*," as in the hot-debated case of climate change. In these situations, only an unspecified and open-ended "*Subject*" is needed. It is this original argument that is ignored by existing literature and, therefore, forms one of the central arguments of this article.

Consequently, the two terms, abstraction and generality, are defined by a new formula. The former means the applicability in an unlimited number of cases, usually in the form of unspecified and open-ended indirect addressees (if in existence, the substantive "*Object*") of a legislative resolution, whereas the latter presents the unspecified and open-ended direct addressees (the literal

[27] U.N. SCOR, 26th Sess., 1588th mtg, at 3, U.N. Doc. S/PV. 1588 (Oct. 5, 1971).

[28] Michael Fremuth & Jörn Griebel, *On the Security Council as a Legislator: A Blessing or a Curse for the International Community?*, 76 NORDIC J. INT'L L. 339, 342 (2007).

"*Subject*"), usually in the form of "all Member States." Only by fulfilling the above pillars, can a binding resolution become legislative.

Breakey is the only author to mention the distinction of the dual-addressee attributes of legislative resolutions before this research, when he used "agent" State and "subject" State respectively. However, no distinction was made by him on their varied significance in judging a legislative resolution. In his view, it is enough to become legislative if the "agent" State ("*Subject*" in this work) is not specific.[29] Nonetheless, this argumentation is problematic. Unlike what Breaky argues, specificity in any one of the two renders a resolution as an ordinary resolution instead of a legislative one. Specificity of "*Subject*" automatically makes a resolution non-legislative as the addressee is targeted. Specificity of "*Object*" makes a resolution non-legislative because the Council is originally working on behalf of all Member States, and ordering Member States to act in a specific way is natural and common within the scope of its daily activities with no reason to make a resolution so adopted legislative. The academic ignorance of this issue comes from the oblivion that, different from domestic legislatures, one of the Council's basic functions is to mandate binding Chapter VII enforcement and its implementation from all or certain Member States. It eliminates threats to the peace under a particular circumstance from a particular targeted "*Object*" (no abstraction), through particular literal addressees (no generality), or both (no abstraction nor generality). In these cases, what the Council has done is legally binding, but not legislative.

Two examples may simplify the understanding: In WMD Resolution 1540, under Chapter VII the Council "decides that all States shall refrain from providing any form of support to non-State actors". From this language, both the "*Subject*" (all States) and the "*Object*" (non-State actors) are unspecified and open-ended. In Resolution 1267, under Chapter VII the Council decides that all States shall "[f]reeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban." As the Committee has developed a list of targeted Taliban members, the "*Object*" is clearly specified and targeted (and thus contradicts the necessary "abstraction" pillar) even though the "*Subject*" (all States) meets the generality requirement, which makes this resolution fail to be legislative. Therefore, in sanction resolutions, measures taken are legally binding, but "legally binding" does not equal "legislative." Also, more detailed illustrative applications of this "three-pillar measurement" approach to precisely pick out legislative resolutions will be presented in Part IV.

[29] *See* Hugh Breakey, *Parsing Security Council Resolutions*, *in* THE SECURITY COUNCIL AS GLOBAL LEGISLATOR 60 (Vesselin Popovski & Trudy Fraser eds., 2014).

Other elements to verify the legislative characteristics including novelty[30] and external authority[31] are not necessary in SC legislation. On the one hand, any two resolutions using identical wording in their legislative (*prima facie* lack of novelty) do not deprive of the legislative attributes; on the other hand, the different circumstances of adopting those two resolutions themselves bring a certain degree of novelty. Also, the unique attribute of the Council as a quasi-adjudicatory organ makes the external authority requirement less important.[32] Abbott and others point out three dimensions: obligation, precision and delegation.[33] It should be noted that once a resolution meets the requirements of the three pillars set out above, it will inevitably become legislative in these three dimensions, by virtue of its precision in content and enforced delegation to all Member States.

Therefore, a legislative resolution of the Council needs to be adopted under Chapter VII and needs to use the terminology of "decides" in its provisions. This will allow it to carry binding obligation(s) for all Member States, and both the "*Subject*" (the direct addressees by whom a resolution will be locally and domestically implemented) and "*Object*" (the indirect addressees whom a resolution is designed to deal with, if in existence) in that resolution clause need to be unspecified and open-ended so they are able to be applied to any case, to meet the requirements of abstraction and generality.

C. Rising Soft Law

One of the three essential pillars of SC legislation is resolutions' bindingness. Traditionally, the Council's legislative sphere should be confined to SC legislation, that is, the adoption of "hard law resolutions". More recently, a new trend in the Council's activities was noticed because of its rising impact and popularity: The Council is making more and more "soft law resolutions" which lack the binding obligation pillar's requirements as a formal or orthodox legislative resolution. This soft law method, together with the hard law SC legislation, constitutes the answer to how legislative resolutions impact Member States. Owing to the fact that soft law does not possess the legally binding characteristic as legislative law, its flexibility has given it the nickname of "norms in the twilight between law and politics."[34] These "soft law resolutions" have had different implications for the international community and their power should not be overlooked. Here, they are referred to as "soft legislation"

[30] *See id.*, at 62-63.

[31] *See id.*, at 55-60.

[32] *See* Georg Nolte, *The Limits of the Security Council's Powers and Its Functions in the International Legal System: Some Reflections*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 321-24 (Michael Byers ed., 2001).

[33] *See* Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401-19 (2000).

[34] Daniel Thürer, *Soft Law*, *in* MAX PLANK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Mar. 2009), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1469 (last visited Feb. 25, 2020).

of the Council. For that reason, it is appropriate to conclude that the Council's legislative role involves two parts: binding SC legislation and non-binding soft legislation. Soft legislation exists and is often even preferred by international actors[35] because of its incomparable advantages in shaping minds, the relatively low contracting and sovereignty cost, and the easiness of its achievement.

Nye used the parent-teenager relationship as an example of non-binding power: in politics, it was used to shape others' beliefs and preferences, similar to what a parent does to his or her offspring.[36] An important grounding for the rising phenomenon of soft legislation within the Council is that the Council as a political organ is trying to shape the minds of her "teenagers" – in this case, the 193 UN Member States.

The adoption of a "hard law resolution" needs more groundwork than the adoption of a "soft law resolution."[37] Complex and time-consuming rounds of discussions and debates coupled with calculations and bargains within this miniature forum will increase the contracting cost exponentially. The adoption could also ultimately be rejected meaning all of the time, energy and resources that were put into the negotiation were in vain. Furthermore, any binding obligations imposed on a Member State will cause the State to take on a burden, and the more it takes on, the weaker it feels, and this could incur the worry of sovereignty, which may eventually make an intolerant State withdraw from an organization.[38] Although it is hard to imagine a large-scale withdrawal from the UN amongst Member States, if sovereignty was in question, it could be costly for all parties.

Differing from how hard law approaches emergency and uncompromising situations, soft legislation in the Council allows more balance. The five permanent members of the Council, especially the United States, have shown keen support for this type of resolutions for the sake of the sense of control and other various benefits they can bring.[39] Support from these major powers is vital for the Council to remain an influential political organ. Soft legislation welcomes a more open interpretation, more compromises and leeway and allows for potential uncertainty and change, which makes adoption of such a resolution highly achievable.

It is necessary to be mindful of the socio-political roots of the Council to frame the issue. From a legal perspective, the Council calls on "hard law resolutions" (SC legislation) to collaboratively deter and internally punish outlaws, while it deploys "soft law resolutions" (soft legislation) to preach.

[35] *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 423 (2000).

[36] *See* Joseph S. Nye, *Soft Power*, 80 (Twentieth Anniversary) Foreign Policy 153, 166 (1990).

[37] *See* Abbott & Snidal, *supra* note 35, at 434-36.

[38] *See id*., at 437.

[39] *See* Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 398-99 (2005).

Accordingly, political scientists have already provided more lively and understandable jargon for the two: "the possession goal" as the former, "the milieu goal" as the latter.[40]

D. The Necessity for the Council's Legislative Resolutions in Modern Terms

1. Five Reasons

a. Solidarity

Democracy necessitates a strong sense of solidarity.[41] Despite the fact that the Council is a non-plenary organ, which could be argued by some as an organizing form that weakens democracy, it does not mean that democracy is of less importance. In reality, democracy not only has long been the central theme of the Council's aims,[42] but also is one of the six core values put forward in the Millennium Declaration pronounced by 189 heads of State within the UN. Some disagreed with the wording of international community or international solidarity in total, holding that "[t]he coincidence of interests is all there is."[43] With the increasing emphasis on the notion of international cooperation and the ideal of global governance, this argument is apparently obsolete in the era of globalization. As a further matter, what inter-State solidarity truly speaks of is the reciprocity between States.[44] The Council enhances solidarity by means of legislation at different stages. States, especially the Council members, collaborate to collect supranational information, make globally-applicable initiations and represent reports at the preparatory stage; they discuss, debate and interchange State standings concerning a particular issue at the resolution adoption stage; they implement such legislative resolutions in their respective jurisdiction cooperatively; they create the "peer pressure" to reinforce the implementation from other States. The united preparation, adoption, and implementation processes themselves further pave the way for solidarity in the entire organ and the UN, which will make great contributions to the realization of the UN core values. Lauterpacht foresaw the importance of solidarity in his time by saying "[t]he disunity of the modern world is a fact, but so, in a truer sense, is its unity. Th[e] essential and manifold solidarity, coupled with the necessity of securing the rule of law and the elimination of war, constitutes a harmony of interests which has a basis more real and tangible than the

[40] *See* Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* 67-80 (1962).

[41] *See* Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247, 253 (2006).

[42] *See* Karel Wellens, *The UN Security Council and New Threats to the Peace: Back to the Future*, 8 J. CONFLICT SEC. L. 15, 28 (2003).

[43] Alexander Somek, *Kelsen Lives*, 18 EUR. J. INT'L L. 409, 447 (2007).

[44] *See* Andrea Sangiovanni, *Solidarity in the European Union*, 33 OXFORD J. LEGAL STUD. 213, 230 (2013).

illusions of the sentimentalist or the hypocrisy of those satisfied with the existing 'status quo.'"[45]

b. Subsidiarity

In an international social matrix, subsidiarity requires that the governance should remain at the international level only when the affair for governance goes beyond what a lower (national) level institution can manage.[46] In reality, those issues that the Council has been trying to tackle by way of legislation are less likely to be solved on the domestic plane due to its supranational and transnational complex nature. Benvenisti notes that there is a tendency towards "the proliferation of coalitions," which leads to the disinclination for powerful States to live through traditional international lawmaking processes by creating too many constraints. Therefore, States have switched to new approaches to international lawmaking, which enables the Council to "prescribe new laws" and "fill such gaps."[47] This is the case in the times of global governance. For instance, a batch of counter-terrorism conventions was signed before the adoption of Resolution 1373, but none of them has worked successfully because of the low number of States who participate, the high number of reservations and the ineffective monitoring mechanisms.[48] Another typical example is that even though there have been several international non-proliferation treaties widely ratified, they do not offer an answer to non-State actors, and the implementation by State parties is far below the expectation.[49] Such a retrospective view will not perfect SC legislation, but it does serve as a potent impetus to push forward the support for SC legislation from a meaningful perspective of the principle of subsidiarity.

c. Consistency

Consistency literally means the quality of behaving consistently without violent change over time. By releasing resolutions to the whole international community, the Council, along with its powerful members and other Member States of the UN, clarifies their position on a certain issue. This is to not only alert the rest of the world of the severity of the issue and a unified attitude towards it, but also to create a normative model for Member States to improve

[45] *See* H. Lauterpacht, *The Reality of the Law of Nations*, *in* INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 22, 26 (E. Lauterpacht ed., 1970).

[46] *See* Isabel Feichtner, Subsidiarity, *in* MAX PLANK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Oct. 2007), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1477 (last visited Feb. 25, 2020).

[47] *See* Eyal Benvenisti, *"Coalitions of the Willing" and the Evolution of Informal International Law*, *in* COALITIONS OF THE WILLING: AVANTGARDE OF THREAT? 26 (Christian Calliess et al. eds., 2007).

[48] *See* Tsagourias, *supra* note 5, at 554.

[49] *See* Masahiko Asada, *Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation*, 13 J. CONFLICT SEC. L. 303, 307 (2008).

a sense of international self-discipline. Each legislative resolution creates or nourishes an international order of consistency for States to follow steadily; it perpetuates the Council's governance and prolongs the life of global governance in the long term. Alvarez considers that the SC legislation is global hegemonic international law ("global HIL") in action.[50] It is noteworthy that however "hegemonic" SC legislation may seem, critics should shift their attention to curbing that power opposed to banning the creation of an international order of consistency needed by the international community.

d. Emergency

Emergency is an ancient reason for which the Council plays the role traditionally bestowed upon the Assembly which recommends long-term measures as the lag of the Assembly's actions could impede efficiency and, therefore, not be agile enough to address imminent threat or breach of the peace.[51] Furthermore, emergency accounts for the earliest initiation of such legislative resolutions, when the widespread recognition of these resolutions is only limited to the function of "emergency regulations."[52]

e. Convenience

SC legislation within a condensed organ of limited membership will save time in negotiation and adoption, and make it easier to reach an agreement. The entire process is far more efficient and simpler than making a recommendation in the Assembly,[53] let alone a treaty or other forms of agreement. Furthermore, individual treaties or agreements are often weakened by their limited membership; even signing a non-binding declaration with international consensus outside the UN framework is not easy to accomplish.

2. The "Why Not?" Query

After deliberating over the reasons why the legislative activities should be espoused, the quest moves to the ascertainment or discernment of whether there are reasons instructive enough to drive a "no" out of the heart of the issue. Crawford points out that what truly matters in the discussion is whether or not the diffused facts, like terrorism, should be treated as a "threat to the peace" and whether the Council can take generic measures as counteractions. However, he

[50] *See* José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 875 (2003).

[51] *See* Rosand, *supra* note 1, at 575.

[52] See *The United Nations and the New Threats: Rethinking Security*, ISTITUTO AFFARI INTERNAZIONALI, http://pubblicazioni.iai.it/pdf/Convegni/Rethinking_Security_rep.pdf (last visited Feb. 25, 2020).

[53] *See* Rosand, *supra* note 1, at 575.

nods towards each of the two questions.[54] As Crawford noted, the Council's formidable discretionary power is fully recognized, and in particular, both the language of "threat to peace" and "measures" are too broad to pose a rebuttal.

To have an overarching understanding of the issue, one must revisit the various arguments that academics put forward against the Council's legislative role. Having analyzed these challenges, it can be seen that these contentions were largely built upon the periphery of the issue, that is, the Council's deficiencies in organization and structure, the lack of effective review mechanisms, the inability to curb the Council's expansion of power and so forth. It should be stated that to date the core issue above has never been challenged or touched upon. In a similar vein, since there is the consensus that the Council should be capable of deciding and enforcing measures against the illegalities, from the teleological interpretation, there seems no reason for it to decide and enforce measures for the legalities. From a factual analysis, there is a simple logical conclusion – when the Council continues to punish or sanction every individual terrorist group, it does *de facto* create a law against terrorism.

III. DISSENTING VOICES AND OUR RESPONSES

As mentioned in the last Part, the necessity of assuming the legislative role by the Council is strongly required. However, there has been criticism from both academics and political actors so further explanation is required. In order to be more critically convincing, the nucleus that invites controversies continuously in the discussion about SC legislation, owing to its binding character, should be zoomed in for careful observations and given accurate and vigilant responses.

A. Power Doctrines

Discussions about the Council's legislative role have drawn much attention from scholars who have been trying to solve the problem from the perspective of the inherent powers entrusted to the Council as a UN organ by the constitutive documentation of the organization – the UN Charter. As analyzed in the Section A of the Part II above, such a legislative power has not been explicitly enumerated. Thus, the theory of enumerated powers allows the use of the Council's powers that are closely linked to what the UN Charter enumerated. All other uses of powers are considered *ultra vires*.[55] The doctrine of *ultra vires* leads to the doctrine of enumerated (or explicit) powers.

Correspondingly, the doctrine of implied powers, based on the Council's general function of maintaining international peace and security, strikes a

[54] *See* JAMES CRAWFORD, CHANCE, ORDER, CHANGE: THE COURSE OF INTERNATIONAL LAW 426-27 (2014).

[55] *See* Bernd Martenczuk, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?*, 10 EUR. J. INT'L L. 517, 542 (1999).

balance with the aforesaid doctrine of *ultra vires* advocating enumerated powers.[56] In the *Reparation for Injuries Suffered in the Service of the United Nations* case, the ICJ introduced the existence of the powers "not expressly provided in the [UN] Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[57] The ICJ also expressed its endorsement of the doctrine in *Certain Expenses*[58] and *Namibia*[59] cases. In the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case, the ICJ expressed its strong inclination by carefully explaining:

> "The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as 'implied' powers."[60]

By virtue of the frequent references to and the wide acceptance of the implied powers doctrine whose application criterion is whether the exercise of the power is necessary for the attainment by the organization of its object and purpose as specified in its constituent instrument,[61] the negation of the legislative resolutions through the rigid orthodox "law-based doctrine of *ultra vires*"[62] is unconvincing. However, it is imprecise to say that there would be no challenges towards the widely-used doctrine of implied powers.

The doctrine of implied powers itself is "fundamentally 'empty,'" as the doctrine lacks the "abstract 'sustainability'" to constitute complete explanation and the only access to understanding and interpretation of it is through its practical applications.[63] Nasu gives the opinion which alleges that the implied powers doctrine only dealt with the power available for an international organization enjoying a legal personality to realize the purposes and functions narrated in the constitutive document, and therefore, it should not be confused with the power expansion of a particular organ within that organization; hence in the UN's case, implied powers should not be invoked as an excuse for the Council's unlimited power use under Chapter VII.[64]

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[56] *See* EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE 116 (2014).

[57] Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), [1949] ICJ Rep 174, at 182.

[58] *See* Certain Expenses, *supra* note 18, at 168.

[59] See *Namibia*, *supra* note 20, at 51-52.

[60] Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion), [1996] ICJ Rep 66, at para. 25.

[61] *See* Danesh Sarooshi, *The Powers of the United Nations International Criminal Tribunals*, 2 MAX PLANCK Y.B. OF U.N. L. ONLINE 141, n. 7 (1998).

[62] *See* BENVENISTI, *supra* note 56.

[63] *See* Viljam Engström, *Implied Powers of International Organizations: On the Character of a Legal Doctrine*, 14 FIN. Y.B. INT'L L. 129, 130-131 (2003).

[64] *See* Hitoshi Nasu, *Chapter VII Powers and the Rule of Law: The Jurisdictional Limits*, 26 AUSTL. Y.B. INT'L L. 87, 103 (2007).

This contention, however, should not be fully justified. The author seems to agree with the legislative power of the UN, which was an international organization with an independent legal personality and part of whose mission is to maintain international peace and security, by tacit agreement, whereas refuses the Council's full use of that power. The question then arises as to whether the legislative power granted to the UN under the doctrine of implied powers for the maintenance of international peace and security can be deployed by the primary organ of the UN on that matter. If the Council can't, then the question arises which part of the symbolic "UN" could in actuality use that power to legislate on international peace and security matters. If granted to a new-created organ or another existing organ like the Assembly, it is unclear whether it will be considered to be an act *de facto ultra vires* to trespass on the Council's exclusive primary role bestowed upon by the UN Charter with regard to these matters.

In summary, the doctrine of *ultra vires,* or enumerated powers, fails to bar the Council from legislation, and the Council is the only suitable legislator under the doctrine of implied powers.

B. State Sovereignty

Some States believe that SC legislation, by way of imposing open-ended binding international obligations, weakens their own jurisdictional authority and thus trespasses on their sovereignty.[65] From this view, one may contend that the obligations have been imposed on States without State consent. However, the question of State sovereignty is superficial and one-sided. Legislative resolutions of the Council are *de facto* adopted and implemented by all Member States of the UN by their own volition. During this entire process, no State sovereignty is trespassed upon.

Unlike implementation of domestic law, international law generally has no direct implementer at the international level. In most of the cases, States are the implementers of international binding rules. The same logic works for the Council's legislative resolutions as well. The implementation of these resolutions fully depends on the "willingness and capacity" of each Member State.[66] During the implementation phase, States need to incorporate the rules into their domestic legal systems, and stipulate corresponding adjudicatory and enforcement measures therein.[67] In this sense, it is proper to conclude that "the power of the Council is contingent on the voluntary cooperation of States."[68] When a State regards a resolution as inappropriate for implementation, it can simply

[65] *See* Tsagourias, *supra* note 5, at 541.

[66] *See* Bianchi, *supra* note 3, at 918.

[67] *See* Andrea Bianchi, *Security Council's Anti-terror Resolutions and their Implementation by Member States*, 4 J. INT. CRIM. JUST. 1044, 1045 (2006).

[68] Ian Hurd, *Legitimacy, Power and the Symbolic Life of the UN Security Council*, 8 GLOBAL GOVERNANCE 35 (2002).

choose to resort to non-compliance.[69] The aim of summoning States to adopt such legislative resolutions is to have them implemented as expected, however without support from Member State, the resolutions cannot be implemented. Therefore, during the adoption process of these resolutions, the plausibility of State's cooperation in implementation is of essential importance. Consequently, this unavoidable link between adoption and implementation of SC legislation composes the corollary that "[t]hese resolutions were also adopted by consensus"[70]

Benvenisti proposed Resolution 1540 as an example for SC legislation and he noted that the resolution did not specify any measures of enforcement; on the contrary, it only required Member States to adopt "appropriate" or "effective" measures for implementation.[71] This generalized "appropriate" or "effective" wording is understandable, as Member States, due to their different legal traditions, cultural backgrounds and implementation capacity, may choose discrete measures to implement an international legislation in a way that fits. To step deeper, this also demonstrates that the adoption and the choice of "implementing or not" depends on the consent of States, but also the decision on what measures should be taken and the way in which these measures are taken during the implementation progress, are all at the discretion of Member States.

Like what it has done in the fields of anti-terrorism and illegal migrant smuggling prohibition, the Council must adopt resolutions that bring about unanimous agreement from the international community as a whole. Member States must also have complete discretionary power to control the progress of SC legislation through implementation phase. The role of Member States in the entire lifecycle of a legislative resolution is of utmost significance and throughout the course of implementation, the will and sovereignty of Member States are fully respected.

C. The Challenge of Transparency

Transparency means "greater exposure in the decision-making processes, and more openness to outsiders."[72] The Council has received many suggestions and criticisms with regard to its lack of transparency, and from the perspectives of the opponents, such lack of transparency makes SC legislation a matter requiring vital binding enforcement activities from all Member States more burdensome. These opponents largely invoke the constitutive spirit to reject the legitimacy of expansive activities of the Council and minimize its effective-ness.[73] They point out the informal consultations held prior to the formal meetings, which enable the members of the Council to negotiate in a

[69] *See* CRAWFORD, *supra* note 54, at 428.
[70] *See* Tsagourias, *supra* note 5, at 558.
[71] *See* Benvenisti, *supra* note 47, at 22.
[72] Saira Mohamed, *Shame in the Security Council*, 90 WASH. U. L. REV. 1191, 1223 (2013).
[73] *See* Wood, *supra* note 10, at 154.

secretive way and thus carries the name of "informal consultations of the whole".[74] They criticize the limited publicized information during the whole adoption process and call for more participation of the non-members in informal meetings, more daily digests of the meetings and more documents which have been discussed therein to make them fully understand the motives behind formally issued state-ments.[75]

All these advocations sound very reasonable and attainable before one actually adopts these into practice. The disadvantage claimed by the non-members is an advantage to the members of the Council as they uphold the idea of "the greatness of confidentiality." Such confidentiality effectively removes the interruptive pressure from the outside, enhances the depth of negotiations and makes the negotiation more focused. Moreover, there are more and more discussions involving expertise and professional levels which by nature cannot attain too much transparency.[76] As the view presented by Ambassador Marker of Pakistan concluded:

> "…[C]onfidentiality of exchanges is essential for the decision-making process, including the achievement of consensus, and for the effective dispatch of business of the Security Council. Indeed, much of the new-found effectiveness of the Council can be attributed to the procedure of confidentiality, which provides the climate for free-ranging, sometimes almost uninhibited debates which precede, influence and eventually shape the decisions that finally emerge from the Council's consideration. The informal consultations procedure also possesses the considerable advantage of providing flexibility to delegations during the negotiating process."[77]

However, the Council is fully aware of the concern and has been trying to address the issue by promoting more open meetings and discussions preceding the formal adoption of legislative resolutions, as in the case of the adoption of Resolution 1540 where five months was given for consultations and open meetings with non-member States.[78] As for the informal consultations in advance of the formal meetings, briefings by the President are available for non-member States and the provisional agenda is accessible in the *UN Journal*.[79] Participation of non-member States in official meetings has increased.[80] Voting information, especially lists of States voting "for" or "against" replacing a simple vote count, is publicized.[81] Therefore, much progress has been made so far.

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[74] *See id*., at 155.

[75] *See* Mohamed, *supra* note 72, at 1221.

[76] See *Special Research Report 2010 No. 1: Security Council Working Methods: A Work in Progress?* [hereinafter "Report 2010"], SECURITY COUNCIL REPORT (Mar. 2010), http://www.securitycouncilreport.org/special-research-report/lookup-c-glKWLeMTIsG-b-5906427.php (last visited Feb. 25, 2020).

[77] U.N. SCOR, 49 Sess., 3483rd mtg, U.N. Doc. S/PV. 3483 (1994).

[78] *See* Tsagourias, *supra* note 5, at 557.

[79] *See* Mohamed, *supra* note 72, at 1221.

[80] *See* Hurd, *supra* note 68, at 42.

[81] *See* Mohamed, *supra* note 72, at 1215.

Despite the effort from the Council to allow more transparency in the resolution procedure, one should not forget the political make-up of the Council itself. The five most powerful players in the Council are very reluctant toward any more transparency.[82] The report singled out a compromised truth: "The greater transparency may in fact be an illusion."[83] Although there is a difficult balance between efficiency (confidentiality) and transparency for adopting binding resolutions, including legislative ones, that does not hamper the legitimacy of SC legislation. The problem is born out of an inherent flaw in the system, but not a mistake to negate these activities overall. Also, the approach to achieving such balance is contingent upon the particular circumstances in each case, and "it is probably unwise to formalize procedures to this end."[84]

D. Egalitarianism and the Permanent Five Politics

There is a general concern that whether a Council of limited membership, particularly with the five permanent members (P5), could represent the 193 UN Member States correctly, especially with "the present activist approach," including through legislative means, in maintaining international peace and security.[85] In this section, the applicability of egalitarianism towards the Council will also be discussed. P5 politics and the inegalitarian *status quo* within the Council should not be an adequate reason to nullify the practicability and validity of the Council's activities, in particular of making legislative resolutions.

1. Egalitarianism and Levelling-Down Objection in the Council

Arneson presents the definition of egalitarianism from its primary origin:

> "An egalitarian favours equality of some sort: People should get the same, or be treated the same, or be treated as equals, in some respect."[86]

The definition initially deals with the egalitarianism between people within a community. There is also no doubt that egalitarianism should be seen as the most common way to attain justice when it comes to relationships between States. The UN Charter puts great emphasis on the respect for sovereignty equality.[87] However, the frequent references to an egalitarian proposition in the UN Charter does not mean that egalitarianism is the panacea for all ills in the UN. In fact, the Council is a typical example of an inegalitarian organ by design

[82] *See* Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, 68 L. & CONTEMP. PROBS. 319, 326 (2005).

[83] Report 2010, *supra* note 76.

[84] Wood, *supra* note 10, at 156.

[85] *See* Owada, *supra* note 22, at 256-57.

[86] Richard Arneson, *Egalitarianism*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Apr. 24, 2013), https://plato.stanford.edu/archives/sum2013/entries/egalitarianism/ (last visited Feb. 25, 2020).

[87] *See* Rosand, *supra* note 1, at 556.

and such inegalitarianism has become one of the distinguishing features of the Council.[88]

This intentional inegalitarian design by the drafters decades ago needs more observations other than a pure legal perspective. One convincing reason lies within the UN Charter as it guarantees sovereignty equality but not power equality. In fact, the great powers, due to their capacity and resources, are the main stakeholders of most initiatives launched by the UN, particularly regarding the sensitive international peace and security matters covered by the Council. From a socio-political point of view, depriving the P5 of their dominant power in the Council as indicated by egalitarians will inevitably be challenged by the levelling-down objection[89] which refuses to deprive those who are better off of their resources and eventually makes them as poor as the rest majority. In this way, egalitarianism is realized.

However, this egalitarianism is reached at considerable cost; if the P5 are deprived of their dominance, they will not only lose their power, but also leave the organization due to their perceived lack of control and security. When this happens, the levelling-down works and the whole system will eventually collapse.[90]

2. P5 Balance and P5 Accountability

The intrinsic inegalitarianism within the Council and its unlikelihood of change was discussed in last section. In reality, the drafters themselves did resist any changes to that inegalitarianism in action. Compared with the Covenant of the League of Nations, a remarkable contradiction is that the UN Charter provides no permission for the increase of the number of permanent or non-permanent members in the Council.[91] Although power "does not translate itself easily into law", powerful States do have different ways to seize priority to control.[92] Like it or not, as Kelsen noted, "[i]t is true that without unanimity the Organization cannot work; but from a political point of view the Organization is superfluous as long as the Great Powers agree."[93] Being the power giants weighing interests at the international level, the P5 also shoulder their indis-pensable accountability within the Council.

There is also an internal balance between the P5 group itself as each country seeks to maximize their own interests and those of their allies'. The five countries have very different roles to play out due to their respective distinctive cultural, historical, and geopolitical situations. While from an external point of

[88] *See* Wood, *supra* note 10, at 152.

[89] Stefan Gosepath, *Equality*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jun. 27, 2007), https://plato.stanford.edu/archives/spr2011/entries/equality/ (last visited Feb. 25, 2020).

[90] *See* Krisch, *supra* note 39, at 371.

[91] *See* Kelsen, *supra* note 2, at 1087.

[92] *See* Benvenisti, *supra* note 82.

[93] Kelsen, *supra* note 2, footnote 40.

view, smaller countries often do not have the ability to protect themselves effectively in matters like security, so they have to rely upon the great powers to a certain extent.[94] Smaller countries feel safer finding a "protector" within the P5 by whose attitude their decisions are largely influenced.[95] The design of P5 is meaningful as, on the one hand, it respects the purpose of "speed and efficiency";[96] on the other hand, it allows the real players to fulfil decisive participation in a mutual balanced way and thus guarantee the Council's long-term health.[97] Therefore, the P5 are cautiously balancing their interests within the Council or the world, as well as taking accountability for upholding the entire security system. The P5's ability to manipulate the Council's activities has been exaggerated.[98] Moreover, there is a tendency that non-permanent and non-Council members are carrying more weight in the Council's decision-making process.[99]

As noted earlier, Alvarez uses global HIL to describe SC legislation, and although the Council is merging hegemonic powers with law, the P5 will not shatter the system they diligently created. For the above reasons, the P5 will definitely not make improper or indecent legislative resolutions to damage the reputation and entirety of the security unity under their control. The "openly inegalitarian operation" in the Council for SC legislation remains the optimal approach with lower costs but higher legitimacy than anything that has come before it.[100]

It seems pessimistic to say that the egalitarianism is only an ideal utopia inside the UN and, in particular, the Council. It should be noted that power does matter in international confrontations. Even the United States, the only superpower State proud of its democracy and justice, sadly accepted the fact that the country is overwhelmingly influenced by elites and interest groups, "while mass-based interest groups and average citizens have little or no independent influence."[101]

The inegalitarianism within the organ is inherent and will not easily be altered in the foreseeable future. However, the P5 also will not threaten the effectiveness of the Council by lobbying it to create negative legislative activities. The egalitarian contention does not serve as a convincing interception of SC legislation.

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[94] *See id.*, at n. 4.

[95] *See id.*, at 1119.

[96] *See id.*, at n. 4.

[97] *See* Wood, *supra* note 10, at 153.

[98] *See id.*

[99] *See* Hurd, *supra* note 68, at 42.

[100] *See* Krisch, *supra* note 39, at 380.

[101] Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564 (2014). The research series is available at THE JOURNALIST'S RESOURCE (Nov. 4, 2014), https://journalistsresource.org/studies/politics/finance-lobbying/the-influence-of-elites-interest-groups-and-average-voters-on-american-politics (last visited Feb. 25, 2020).

As examined in this part, the dissenting voices raised from the perspectives of power theories of international organizations, individual states, and the inner structure and the political environment of the Council, due to its one-sidedness, are redundant. Voices above do not pose threats to the overall merits of promoting SC legislation. Conversely, the corresponding counterarguments to these voices have proven sufficient to counterbalance or even outweigh these worries.

IV. LEGISLATIVE RESOLUTIONS ADOPTED BY THE COUNCIL

As mentioned earlier, the emphasis in this article will be on binding resolutions with legislative characteristics. In addition, owing to their rising influence in the international community, the soft, non-binding but generic resolutions will also be touched upon. In this part, an overview comprising both types of the Council's legislative activities will be sequentially introduced.

A. Security Council Legislation

SC legislation in general is divided into five themes: counter-terrorism, non-proliferation, combatting illegal smuggling of migrants, International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), and International Criminal Court (ICC).

1. Counter-Terrorism Resolutions

a. Resolution 1373 (2001)

Prior to the 9/11 tragedy, the Council's attitude towards terrorism remained reactive.[102] However, the unanimously adopted Resolution 1373 is a monumental step by the Council towards proactively imposing all Member States legally binding obligations to prevent and suppress terrorist acts collectively under its mandate. The Resolution was adopted two weeks after the attack, demonstrating an "immediate, unprecedented and unified international action and political cohesion against terrorism."[103]

In Resolution 1373, legislative decisions appear in three operative paragraphs. Paragraph 1 deals with the prohibition of financing terrorist acts by way of criminalizing direct and indirect willful provision or collection of funds for terrorists, freezing funds, financial assets and economic resources and suspending services related to the foregoing items. Paragraph 2 confirms prohibition of any form of support of terrorist acts, prevention of commission of terrorist acts, denial of safe havens for terrorists and accomplices and

[102] *See* Anton du Plessis, *A Snapshot of International Criminal Justice Cooperation Against Terrorism Since 9/11*, *in* COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER: MEETING THE CHALLENGES 43 (Larissa van den Herik & Nico Schrijver eds., 2013).

[103] *Id.*, at 44.

establishment of effective domestic penalization. Paragraph 2 also prevents terrorist movements and calls for cooperation between Member States to restrict such movements. Paragraph 6 announces the establishment of a counter-terrorism committee within the Council.

b. Resolution 2178 (2014)

Confronted with the rampant spread of the "Islamic State in Iraq and the Levant" (ISIL) group and the Al-Nusra front and other affiliates of Al-Qaeda,[104] the Council unanimously adopted Resolution 2178. The operative paragraph, paragraph 5, "decides" to mandate that all Member States, with due respect for international human rights law, international refugee law and international humanitarian law, prevent and suppress foreign terrorist fighters' and related supporting activities.

Counter-terrorism resolutions above composed a classical model of SC legislative resolutions, because they perfectly fit into our skeleton of "three-pillar measurement": binding obligations (with the determiner "decides"), abstraction (unspecified terrorists as the abstract *Object*) and generality ("all Member States" as the general *Subject*). Thanks to the adoption of Resolution 1373, the Council has become "a crucial vehicle to address the growing problem of terrorism worldwide. "[105] In general, the response from Member States is considered to be "remarkable."[106] Legislative resolutions have largely been welcomed by Member States since their adoptions are indispensable in global collective counter-terrorism initiations. As Bianchi noted, "[i]t is remarkable that states have manifested no overt opposition to Resolution 1373 and its alleged law-making character."[107]

2. Non-Proliferation Resolutions

a. Resolution 1540 (2004)

Resolution 1540 was unanimously adopted to prevent the proliferation of weapons of mass destruction ("WMD") owned by non-State actors, especially by terrorist groups. In 2003, the UK initiated a "counter-proliferation committee" amongst EU countries and criticized in the Assembly the Council's inaction towards proliferation later in the same year. George W. Bush's call for international criminalization of WMD proliferation and enforcement measures

[104] *See* Anne Peters, *Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person, Part I*, EJIL: TALK! (Nov. 20, 2014), http://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i/ (last visited Feb. 25, 2020).

[105] Sanjay Sethi, *Security Council Strengthens Fight Against Terrorism*, 39 UN CHRON. 22 (2002).

[106] *Id*.

[107] Bianchi, *supra* note 3, at 917.

in the Assembly also made the US another leader in non-proliferation promotion activities.[108] Despite these two initiatives, the political point of origin remains unclear.[109] However, there is no doubt that the most direct impetus to the Council's action was from the "A.Q. Khan network" which was discovered in early 2004. Abdul Qadeer Khan was actively involved in spreading nuclear weapon technologies to countries like Iran, Libya, and North Korea.

Legislative clauses appear in operative paragraphs 1-5 of Resolution 1540. Paragraph 1 prohibits States from providing any form of support to non-State actors' activities related to WMDs and paragraphs 2 and 3 demand adoption and enforcement of domestic laws and effective measures in all Member States. Paragraph 4 sets up a committee which, amongst other things, oversees domestic implementation. Paragraph 5 shows respect for other non-proliferation related treaties imposing obligations to its States Parties.

b. Other Resolutions within the 1540 Committee

Resolutions 1673 (2006), 1810 (2008), 1977 (2011) decide to extend the mandate of the 1540 Committee for 2, 3 and 10 years respectively, and they, as along with Resolution 2325 (2016), decided to make the Committee better at promoting implementation within Member States. Most recently, Resolution 2572 (2021) was unanimously adopted on April 22, 2021, to extend the mandate of the 1540 Committee until February 28, 2022.

These non-proliferation resolutions, similarly, get categorized into our legislative resolution league, because they also meet the "three-pillar measurement" test: binding obligations (with the determiner "decides"), abstraction (unspecified "non-State actors" as the abstract *Object*) and generality (all Member States as the general *Subject*). In December 2016, the Council released the first comprehensive review required by Resolution 1977, which calls for two reviews: one in 2016 and before the end of the mandate of the 1540 Committee in 2021 respectively. Although the second comprehensive review was postponed due to the pandemic (SARS-CoV-2),[110] statistics in the first comprehensive review show that most Member States have made great efforts to guarantee the implementation of Resolution 1540, especially the prohibition of

[108] *See* Hanne Veel, *1540 and the 2016 Comprehensive Review: A brief history of United Nations Security Council Resolution 1540 in light of the 2016 Comprehensive Review*, 3, INTERNATIONAL LAW AND POLICY INSTITUTE (Jun. 2016), http://nwp.ilpi.org/wp-content/uploads/2016/06/BP18-16-1540-and-the-2016-Comprehensive-Review.pdf (last visited Feb. 25, 2020).

[109] *See id.*

[110] See *About 1540 Committee | General Information*, 1540 COMMITTEE, https://www.un.org/en/sc/1540/about-1540-committee/general-information.shtml (last visited Feb. 25, 2020).

non-State actors' activities related to WMDs,[111] and "[g]overnments all over the world are working hard to implement its requirements. "[112]

3. Combatting Illegal Smuggling of Migrants Resolutions

a. Resolution 2240 (2015) and Resolution 2312 (2016)

An epidemic of human smuggling has caused an explosive increase in deaths around the Mediterranean since 2013. With unchecked human smuggling, the "Central Mediterranean Route" running from North African to Italy and Malta through the Mediterranean Sea, reported that illegal migrants in Italy reached 170,000 persons in 2014, and the situation continued to deteriorate in 2015.[113] The EU Council successively issued a "ten point action plan on migration" and Decision (CFSP) 2015/778 setting up "EUNAVFOR MED" which presents an operational plan structured into several phases to tackle human smuggling, covering both immediate and long-term actions.[114] However, these diplomatic actions from the EU seemed futile due to the opposition from Libyan government, other African countries, and Russia. An internationally recognized solution to was greatly needed.[115]

The Council played its role as a legislator in operative paragraphs 7, 8, and 10 of Resolution 2240. Paragraph 7 demands Member States inspect reasonably suspicious vessels on the high seas off the coast of Libya with the prior consent from the flag State. Paragraph 8 enables seizure of the inspected vessels once migrant smuggling activities are confirmed. Paragraph 10 authorizes Member States to use all commensurate measures to fight against human smuggling under paragraphs 7 and 8, and in conformity with international human rights law. Resolution 2312 renews the authorizations for a further period of twelve months.

These resolutions also meet the "three-pillar measurement" test: binding obligations (with the determiner "decides"), abstraction (any reasonably suspected vessels used for migrant smuggling or human trafficking from Libya as the abstract *Object*) and generality (all Member States as the general *Subject*). As previously stated, the main paragraphs applicable to the implementation in Resolution 2240 are paragraphs 7 and 8, with paragraph 10 as a generalized

[111] *See* U.N.S.C., *Letter dated 9 December 2016 from the Chair of the Security Council Committee established pursuant to resolution 1540 (2004) addressed to the President of the Security Council*, at 8-9, U.N. Doc. S/2016/1038 (Dec. 9 2016).

[112] *Fact Sheet: UN Security Council Resolution 1540 (2004)*, United Nations Office for Disarmament Affairs (Jan. 2017), https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2017/01/1540-fact-sheet.pdf (last visited Feb. 25, 2020).

[113] *See* Marco Gestri, *Eunav for Med: Fighting Migrant Smuggling under UN Security Council Resolution 2240 (2015)*, 25 ITALIAN Y.B. INT'L L. 19, 22 (2016).

[114] *See id.*, at 22-23.

[115] *See id.*, at 28.

complement. Because of the vulnerable geographical position of European countries, these countries have been on the front line of combatting the smuggling of illegal migrants. The States members of the EU, except Denmark, have claimed that they merged the implemented measures required by the paragraphs 7-10 of Resolution 2240 into their second phase of the EU military operation that began on October 7, 2015 and was extended to July 27, 2017.[116] Also, those countries that are most impacted have devoted all efforts to rescuing lives in their regions. One such example is Libya where, in 2016, authorities have reportedly conducted rescue missions or interceptions of more than 10,246 men, women, and children.[117]

4. International Criminal Tribunal for Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) Resolutions

a. Resolution 827 (1993) and Resolution 955 (1994)

On May 25, 1993, the Council adopted Resolution 827 which was addressed to all Member States and under whose legislative operative paragraphs established the ICTY for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia (paragraph 2). It requires all domestic legislation of Member States to adopt the Resolution's and the Statute's provisions (paragraph 4). Paragraphs 6 and 7 stipulate the seat and work of the Tribunal. Resolution 955, adopted on November 8, 1994, set up the ICTR at the request of the Government of Rwanda. Operative paragraphs 1, 2, 6, and 7 stipulate the establishment of the Tribunal, Member State legislation for implementation, the workings, and the composition.

b. Other Resolutions[118]

SC legislation can also be found in later resolutions within the framework of these two international tribunals. However, these resolutions, including Resolution 1966 establishing an International Residual Mechanism for Criminal Tribunals, often deal with the appointment and extension of term of office of the judges and amendments to the Statutes of the ICTY and ICTR.

[116] *See* U.N.S.C., *Report of the Secretary-General Pursuant to Security Council Resolution 2240 (2015)*,at 4, U.N. Doc. S/2016/766 (Sep. 7, 2016).

[117] *See id.*, at 3.

[118] They are Resolutions 1329 (2000), 1411 (2002), 1431 (2002), 1481 (2003), 1503 (2003), 1597 (2005), 1660 (2006), 1837 (2008), 1877 (2009), 1966 (2010), and 2306 (2016).

5. International Criminal Court (ICC) Resolutions

a. Resolution 1422 (2002) and Resolution 1487 (2003)

Operative paragraph 3 of Resolution 1422 enables a deferral of the investigation or prosecution under Article 16 of the Rome Statute by the Council, while operative paragraph 3 of Resolution 1487 serves as an extension.

B. Soft Legislation

Except for those analyzed above, international organizations' resolutions carrying abstract and generic characteristics are generally considered soft law.[119] As for the case of the Council, there are many resolutions containing abstract and generic paragraphs and clauses that stand for the Council's soft legislation, without being "decisions" under the Chapter VII. These soft legislative resolutions usually constitute different sets of guidelines under different thematic topics of the Council. Furthermore, the width of Council's soft legislation, along with the depth of knowledge and thoughtfulness on each topic, is impressive. Currently, the Council has been keen to issue soft legislation on the following thematic topics: (1) Counter-Terrorism;[120] (2) Protection of Civilians;[121] (3) Children and Armed Conflict;[122] (4) Arms Control and Disarmament;[123] (5) Anti-Piracy;[124] (6) Women, Peace, and Security.[125]

V. SECURITY COUNCIL LEGISLATION – SCOPE AND CONTROL

A. SC Legislation Under the UN Charter and General International Law

Despite the striking power of discretion possessed by the Council, there is a consensus in academia that the powers of the Council are never unfettered.[126] In the case of SC legislation, a binary scope should also apply to valid legislative resolutions. To this end, two components within the scope should be

[119] *See* Thürer, *supra* note 34.

[120] *See* Resolutions 1452 (2002), 1526 (2004), 1566 (2004), 1617 (2005), 1624 (2005), 2133 (2014), 2170 (2014), 2195 (2014), 2199 (2015), 2214 (2015), 2253 (2015), and 2309 (2016).

[121] *See* Resolutions 1296 (2000), 1502 (2003), 1674 (2006), 1738 (2006), 1894 (2009), 2150 (2014), 2175 (2014), 2222 (2015), and 2286 (2016).

[122] *See* Resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005), 1756 (2007), 1820 (2008), 1882 (2009), 1998 (2011), 2068 (2012), 2143 (2014), 2225 (2015), and 2250 (2015).

[123] *See* Resolutions 620 (1988), 984 (1995), 1196 (1998), 1296 (2000), 1612 (2005), 1625 (2005), 1631 (2005), 1674 (2006), 1887 (2009), 2310 (2016), and 2325 (2016).

[124] *See* Resolutions 1816 (2008), 1838 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1918 (2010), 1950 (2010), 1976 (2011), 2015 (2011), 2077 (2012), 2125 (2013), and 2446 (2015).

[125] *See* Resolutions 1325 (2000), 1327 (2000), 1366 (2001), 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013), 2122 (2013), 2242 (2015), 2272 (2016), and 2331 (2016).

[126] *See* Gowlland-Debbas, *supra* note 12, at 90; Rosand, *supra* note 1, at 579; Talmon, *supra* note 15, at 182; Erika de Wet, *Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice*, 47 NETHERLANDS INT'L L. REV. 181, 205 (2000).

satisfied: the procedural element, which ensures the procedural applicability of the legislative resolutions concerned, and the substantive element, to make certain that the resolutions are of legislative decency in their content.

1. Procedural Criteria of SC Legislation

Legislative resolutions in SC legislation are resolutions that carry special legislative characteristics. Therefore, they should satisfy the procedural requirements for the Council's adoption of resolutions in general. As legislative resolutions undoubtedly concern substantive matters, they should be strictly adopted by the Council according to Articles 27(1) and 27(3) of the UN Charter – one member one vote and nine affirmative votes including the concurring votes from permanent members. Also, the question has been raised as to whether legislative resolutions need to have a definite temporal limit.[127] In order to answer this question, two clarifications need to be made. The first clarification is that temporal infinity has never been recognized as a prerequisite of national or international legislation. The primary form of legislation, national legislation, is familiar with national laws that have a specified time limit.[128] The second clarification is that although classic resolutions adopted by the Council are usually "expressly or implicitly limited in time," no rules banning temporal unlimited resolutions have ever been applied.[129] In practice, there are temporal limited legislative clauses, as in paragraph 4 of Resolution 1540, setting a two-year 1540 Committee for examination of the implementation of the resolution. Furthermore, paragraph 7 of Resolution 2312 provided a year extension for the authorization in combatting illegal migrant smuggling under Resolution 2178. There are also general legislative resolutions with no time limits at all, such as Resolution 1373. However, the nature of topics inviting SC legislation always require long-term attention and implementation, which makes legislative resolutions with temporal infinity more common and popular.[130]

Furthermore, there are other procedural components that make SC legislation unique on a case-by-case basis as noted in the Council's working methods handbook: non-members are encouraged to participate in Council public and private meetings;[131] the Council liaises with regional and sub-regional organizations;[132] Council members seek opinions from interested and

[127] *See* Breakey, *supra* note 29, at 60-61; Talmon, *supra* note 15, at 176-77.
[128] *See* Fremuth & Griebel, *supra* note 28, at 343.
[129] *See* Talmon, *supra* note 15, at 176.
[130] *See id.*
[131] *See* U.N.S.C., *Note by the President of the Security Council*, at 6-8, U.N. Doc. S/2010/507 (Jul. 26, 2010).
[132] *See id.*, at 6.

affected parties;[133] other principal organs of the UN including the Assembly are regularly communicated.[134]

2. Substantive Criteria of SC Legislation

a. SC Legislation Within the Framework of the UN Charter

A constitution in international law, different from municipal law, refers to a treaty on which an institution is established and lays out its operational rules. As enshrined in Article 5 of the Vienna Convention on the Law of Treaties of 1969, the UN Charter could be appropriately equated to the "constituent document" of the UN as an international treaty with normative character.[135] The UN Charter, as the constitution of the UN, defines the structure of the organization, the functions and powers entrusted to each of its organs, and the rights and responsibilities of Member States.[136] On that account, the Council, a principal organ of the organization whose power is derived from the UN Charter, needs to act within the guidelines of the Charter. Consequently, it is logical to infer that SC legislation as one of the activities introduced by the Council needs to be subject to the constitutional framework of the UN Charter as well. In the incoming paragraphs, several limitations placed by the UN Charter towards the Council's legislative activities will be analyzed.

Purposes and Principles (Article 1 & 2)

SC legislation should conform with the purposes and principles of the entire system of the UN which are listed in Articles 1 and 2 of the UN Charter. Legislative resolutions need to be aimed at activities related to maintenance of international peace and security,[137] peaceful settlement of international disputes,[138] and promotion of friendly international relations based on the principles of equal rights and self-determination.[139] Also, they can address matters with economic, social, cultural, or humanitarian characters to facilitate international cooperation and, in particular, to promote the protection of human rights and the attainment of non-discriminatory fundamental freedoms.[140] The purposes generally echo the overarching "principles of international law and justice," which is said to be expressly made subject to the measures under Chapter VII , and demands the Council not to fully disregard the existing

[133] *See id.*, at 11.
[134] *See id.*
[135] *See* De Wet, *supra* note 126, at 189.
[136] *See id.*, at 190.
[137] *See* U.N. Charter, Article 1(1).
[138] *See id.*
[139] *See id.*, Article 1(2).
[140] *See id.*, Article 1(3).

international law.[141] Meanwhile, any legislative resolutions in contravention of the principle of sovereign equality[142] and the principle of good faith[143] should not be promoted or implemented. In the same vein, SC legislation trespasses against the prohibition of the use of force, the territorial integrity, and the political independence of Member States,[144] and the non-intervention of matters within domestic jurisdiction,[145] according to the UN Charter, should also be considered deprived of constitutionality.

Delegated Powers Under the Aegis of the UN (Articles 24, 25 and 39)

As previously stated, the Council is seen as the principal organ within the UN responsible for the maintenance of international peace and security. While Articles 1 and 2 introduce the themes and values on which all parts of the organization, including the Council, need to observe, Articles 24, 25, and 39 were enumerated as the direct guidelines to curb the powers granted to the Council. According to Article 24(2), only acts conforming to the purposes and principles of the UN are deemed meaningful.[146] Article 25 explicitly reveals that only decisions that are made in accordance with the present UN Charter will be forced on Member States and the Council only enjoys discretionary functions and powers insofar as prescribed in the UN Charter.[147] More precisely, Article 39 limits the Council's ability to resort to Chapter VII only when circumstances dictate that the Council is needed to "maintain or restore international peace and security."

In summary, for the Council's legislative power, the seemingly complicated and self-contained actions by the Council must be delivered under Chapter VII to address an existed problem (threat to the peace, breach of the peace, or act of aggression) for the aim of maintaining or restoring international peace and security under the aegis of the UN. This must be done in line with the purposes and principles of the UN Charter, and all the discretion involved, if needed, should be consistent with the mandate of the UN Charter.

Respect for Domestic Jurisdiction (Article 2, Paragraph 7)

Within the "purposes and principles" of the UN listed above, Article 2 (7) plays an essential role in guaranteeing the exclusive domestic jurisdiction

[141] *See* Susan Lamb, *Legal Limits to United Nations Security Council Powers*, *in* THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 370 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999).
[142] *See* U.N. Charter, Article 2(1).
[143] *See id.*, Article 2(2).
[144] *See id.*, Article 2(4).
[145] *See id.*, Article 2(7).
[146] *See* Lamb, *supra* note 141, at 368.
[147] *See* Talmon, *supra* note 15, at 182.

reserved to Member States, with only measures conducted under Chapter VII constituting an exception. However, according to Brownlie, the constitutional structure of an international organization enables the fact that the power distribution between itself and Member States will always persist, and further examination is needed on "the context and the interplay of various relevant principles."[148] Member States' authority of domestic jurisdiction will not completely disappear despite Chapter VII being invoked. This viewpoint may be invoked in the case of SC legislation if certain legislation is far outside of the reach of the Council and is generally considered as improperly intruding into the domestic jurisdiction of Member States. As a result, another limit to SC legislation could be created. However, it is still unclear as to what degree the Chapter VII exception can be regarded as improper in the case of legislation. This could explain the Council's overly shy attitudes towards provisions of detailed domestic procedural guidance in its legislative resolutions.

b. Jus Cogens and Erga Omnes Obligations

As the UN includes nearly all States around the globe and the few non-Member States have already recognized the fundamental principles of it, the UN Charter as the constituent document of the organization shall be binding upon all members of the international community at large.[149] However, the normative clauses contained within the UN Charter are not exhaustive,[150] and the constitutional order has been long complemented by *jus cogens*,[151] despite there being certain overlaps between the UN Charter norms and *jus cogens*.[152] On the one hand, the norms in the UN Charter enjoy more gravitas than ordinary treaty provisions owing to its Article 103. On the other hand, *jus cogens* norms retain an overriding nature in customary international law. Even though the Charter remains silent about the hierarchy between itself and customary international law, *jus cogens*, as a matter of fundamental humanitarian concern, should always be construed as a restraint to the UN Charter norms,[153] so do non-derogable obligations of States towards the whole international community (*erga omnes*).[154] Also from an institutional perspective, the organs of the UN should not create obligations violating the *jus cogens* and the *erga omnes* obligations. This is not only because they gain their power from the UN

[148] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 689, 691 (5th ed., 1998).

[149] *See* Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 542 (1998).

[150] *See* Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK Y.B. U.N. L. ONLINE 1, 31 (1997).

[151] *See* Fassbender, *supra* note 149, at 589.

[152] *See id.*; Dupuy, *supra* note 150, at 7.

[153] *See* Lamb, *supra* note 141, at 374; Gowlland-Debbas, *supra* note 12, at 93; De Wet, *supra* note 126, at 194.

[154] *See* De Wet, *supra* note 126, at 193.

Charter, but also that those powers are eventually derived from Member States, who cannot permit the Council to create obligations violating *jus cogens* or *erga omnes* obligations when they themselves cannot either.[155]

c. Implementation Competence and Limitations Ratione Materiae

Even if the Council has acted properly in accordance with the texts of the UN Charter, the legality of their resolutions may face huge challenges when it comes to implementation or limitations *ratione materiae*.[156] Two cases can be invoked as examples to ascertain this "concepts of purpose and necessity":[157] Firstly, Resolution 731, in which the Council asked for the extradition of two Libyan nationals without respect for the international law that dictates that extradition can only be carried out through an extradition treaty, was criticized for the Council's abuse of its role. Secondly, Resolution 687, where the demarcation of the Iraqi boundaries was debated. Although in these two cases are not examples of SC legislation, they provide possible limitations to make the Council self-reflect on its role in adopting legislative resolutions. Talmon also argues that other issues do not resemble the traditional inter-state conflicts, including certain environmental degradation and global health pandemics, could also be considered as threats to peace in future.[158] This expansion of the Council's capacity for legislation further raises the question of what the Council should deem to be a threat and what legislative measures it could take to address the concerns. While it is hard to draw limitations on these matters from the UN Charter, proportionality has been frequently invoked by authors.[159] In the same vein, a substantial causal link between the threat and the obligation is needed.[160] More precisely, even though the Council enjoys great discretion under Chapter VII in the interest of maintaining international peace and security, it still has to rethink the plausibility of its own implementation competence and the limi-

[155] *See* Thomas M. Franck, *The Political and the Judicial Empires: Must There Be a Conflict over Conflict-Resolution?*, *in* INTERNATIONAL LEGAL ISSUES ARISING UNDER THE UNITED NATIONS DECADE OF INTERNATIONAL LAW 625 (Najeeb Al-Naumi & Richard Meese eds., 1995).

[156] *See* IAN BROWNLIE, INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS: GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 218-19 (1995); Lamb, *supra* note 141.

[157] *See id*., at 219; Lamb, *supra* note 141, at 371.

[158] *See* Talmon, *supra* note 15, at 181.

[159] *See id.*, at 185; Tsagourias, *supra* note 5, at 555.

[160] *See* Jan Wouters & Jed Odermatt, *Quis Custodiet Consilium Securitatis? Reflections on the Law-making Powers of the Security Council*, *in* THE SECURITY COUNCIL AS GLOBAL LEGISLATOR 84 (Vesselin Popovski & Trudy Fraser eds., 2014).

tations *ratione materiae* that exist in the particular context, in line with the concepts of purpose and necessity and the principle of proportionality.

B. Controlling Security Council Legislation by Review

The paragraphs above have provided a fundamental scope to ensure the legality of legislative resolutions so adopted. However, the question of whether a legislative resolution is in fact staying within this ideal ambit still deserves further contemplation.

The first task here is to clarify the "recipients" of review, legislative resolutions adopted by the Council. Currently, academia seems to focus on the Council's sanctions resolutions[161] in their debates over the accessibility of review. Nevertheless, as discussed in Part II, sanctions resolutions are not strictly "legislative" as they mostly deal with a particular circumstance or target legislative formulas on a particular targeted object (group/organization/State). Therefore, they do not satisfy the requirements of abstraction and generality as noted earlier. In this way, the review of legislative resolutions by the Council is missing from existing literature. Some scholars believe that, in the Council, the adjudicatory power should be reviewed.[162] Some conclude that legislative power needed a review mechanism but they only referred to adjudicatory power in their arguments.[163] Scholars consistently zero in on the judicial review of the Council's adjudicatory power but this does not mean that sheer legislative acts are not worth examining as well. The fact that those legislative acts have been seen as beneficial so far, according to the discussion of implementation in Part IV, does not guarantee the long-lasting righteousness of the future ones. The Council is, in actuality, a political executive organ with powerful States wielding their priority and the voting system is itself easily broken. There is always a risk of "bad legislation" seeping through.

Since there is no precedent that reviews legislative resolutions of the Council, an analogy drawn from the review of the Council's non-legislative resolutions may provide a good source for future reference. As Brownlie pointed out, the lack of an automatic review system should not negate the "real possibility" to review the *ultra vires* or *intra vires* in certain cases.[164] Hence in theory, there are several players on the stage of judicial review: ICJ, ICTY, ICTR, regional and domestic courts.

[161] They are often used in a particular context to judge a suspected individual or situation through specified application procedures.

[162] *See* Gowlland-Debbas, *supra* note 21, at 119; Bianchi, *supra* note 3, at 902.

[163] *See* Björn Elberling, *The Ultra Vires Character of Legislative Action by the Security Council*, 2 INT'L ORG. L. REV. 337, 338 (2005); Rosand, *supra* note 1, at 543; ANTONIOS TZANAKOPOULOS, DISOBEYING THE SECURITY COUNCIL: COUNTERMEASURES AGAINST WRONGFUL SANCTIONS 87 (2011).

[164] *See* BROWNLIE, *supra* note 156, at 215.

With respect to the ICJ, it might check the legality of the Council's resolutions through advisory opinions or occasionally via contentious cases,[165] as was the case in *Namibia*,[166] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*,[167] and *Wall*.[168] However, a review from the ICJ would only be incidental[169] as the ICJ will face difficulties in finding a proper legal basis.[170] Moreover, even if the ICJ finds a proper legal basis, the authoritative nature of its conclusion is still questionable:[171] an advisory opinion is basically of only an advisory nature, whereas in contentious cases the conclusion of the ICJ is only binding upon the particular parties in the particular case concerned.[172] All of these restraints make the review of SC legislation difficult, or even unpractical. The ICTY and the ICTR have not been afraid to review resolutions from the Council,[173] though it is unclear how much of their reviews could be invoked in SC legislation cases.

As for regional and domestic courts, one may have already witnessed their resistance to review the Council's resolutions, especially those ones under Chapter VII of the UN Charter. The Dutch court's hesitation could be a good example of refusing to deliver an independent ruling on this.[174] The *Kadi* case, however, made a ground-breaking development when the European Court of Justice (CJEU) negated the standing of the Council's resolutions over EU law.[175] Although the court did so with the reasoning that it was reviewing the acts of the EU which implement international agreements instead of reviewing the resolution adopted by the Council,[176] the review did happened and succeeded.

Apart from the judicial review discussed above, there has been some proposals for better institutionalization and cooperation within the UN to ensure

[165] *See* Lamb, *supra* note 141, at 364.

[166] See *Namibia*, *supra* note 20, at 45.

[167] Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United Kingdom*; *Libyan Arab Jamahiriya v. United States of America*) Provisional Measures, Orders of 14 April 1992, [1992] ICJ Rep. 3, at 114.

[168] *See* Wall, *supra* note 18.

[169] *See* Vera Gowland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643, 670-71 (1994).

[170] *Cf.* Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of July 13, [1954] ICJ Rep 47, at 58.

[171] *See* Gowlland-Debbas, *supra* note 170, at 671.

[172] *See id.*

[173] *See* De Wet, *supra* note 126, at 209.

[174] *See* Slobodan Milosevic v. The State of the Netherlands, 41 INT'L LEGAL MATERIALS 86 (Hague Dist. Ct. Civ. L. Div., 2001).

[175] *See* Kadi and Al Barakaat International Foundation v. Council and Commission, Case C–402/05 P and C–415/05 P [2008] ECR I–6351.

[176] *See id.*, para. 286.

that the Council's actions are well-guided,[177] for example, the proposal of setting up a "Chapter VII Consultation Committee."[178]

C. *Other Approaches to Remedy "Bad Legislation"*

When a legislative resolution's legality or validity is challenged, it may be necessary to consider more ways to remedy it besides the dependence on judicial review. Nonetheless, Gowlland-Debbas noted that the ICJ could also play the role of interpreting resolutions.[179] This approach seems to be useful in controlling SC legislation in correcting flaws that make those resolutions *ultra vires*.

Finally, although it is obvious that non-compliance will pose a great threat to uniformity and in return erode the dignity of the UN, from the standpoint of Member States, non-compliance is feasible and can work as the last resort, as both the adoption and the implementation of resolutions still heavily relies on the supports of States.[180]

VI. CONCLUSION

There is no doubt that the international community accepts that the Council has already assumed the role of legislator and it is difficult to blame the Council for undertaking this new role when few well-developed theoretical and practical counterarguments have been found. The most well-developed of these arguments have been brought to the forefront of debates and flaws have been found in their logic. Conversely, reasons for embracing this kind of international legislation appear to be apparent, robust, and clear. The Part IV analyses in this article have demonstrated that the legislative activities of the Council have received a warm welcome from Member States. The world has witnessed the progresses made by Member States in the fields of counter-terrorism, non-proliferation activities, prohibition of illegal smuggling of migrants and women, peace and security thematic protection (WPS). Consequently, the role of the Council as a legislator has proven to be both theoretically and practically appropriate after prudent and pragmatic examinations.

There is still uncertainty about the checks and balances of the Council's power. The hesitation currently shown by the jurisprudences of the ICJ, international tribunals and domestic courts highlights the immaturity of the existing review mechanism. However, domestic courts are still the most promising players to carry out more reviews of legislative resolutions adopted by the Council in the future. This study has shown that in spite of varied criticism against it, the Council's proactive role as a legislator has been *de facto* established and

[177] *See* Alvarez, *supra* note 50, at 888.
[178] W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 99 (1993).
[179] *See* Gowlland-Debbas, *supra* note 12, at 94-96.
[180] *See* CRAWFORD, *supra* note 54, at 428.

become an integral part of contemporary international legislation when the implementation of those legislative resolutions has so far worked satisfactorily. At the same time, there is still a need to bring into being a more organized and thorough review mechanism. Nevertheless, the permanent members of the Council will continue to act cautiously during the adoption of legislative resolutions, and thus it is very unlikely to have "bad legislation" in the Council. So far, none of the existing legislative resolutions has been regarded as "bad" or has been challenged. The international community should be optimistic about the Council's role as a legislator.