Discursive Power in the UN Security Council

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INTRODUCTION

Legal norms relating to the use of force have come under stress in recent years as a result of practices in three areas: self-defense against terrorism, humanitarian intervention, and the use of force to protect civilians in peace operations. Discourse surrounding the practices suggests the normative boundaries have shifted. Much of the discourse has occurred in and around the Security Council of the United Nations, even when the issue at stake is the authority to act unilaterally. This suggests that the Council is not only a decision-making body but also a key venue for deliberation and justificatory discourse—a place where the rules about the use of force are defined, debated, interpreted and reinterpreted. In this article I begin by briefly offering a perspective on where the law stands in each of the three areas identified above. I then turn to an analysis of the Security Council as a deliberative setting, the power of whose deliberations is illustrated, paradoxically, by the reluctance to adopt formal criteria for intervention. I argue that this has important implications for Council reform. If the Council is seen as a deliberative body, then *how* it deliberates is significant. From that perspective, proposals for improving working methods should not be dismissed as a distant second best to expanding the membership. Such proposals go to the heart of the Council's role in shaping the international legal order.

THE USE OF FORCE: EVOLVING LAW AND PRACTICE

Preemption, Prevention and Self-Defense: Accumulation of Events Theory

An instructive way of looking at where the law on self-defense stands post-9/11 is by comparing the reactions to the US-led interventions in Afghanistan and Iraq.[1] The official justification for the US and allied attacks on Al-Qaeda and the Taliban in

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1 For a good cross section of views on both, see Jonathan I. Charney, "Editorial Comments" (2001) 95(4) A.J.I.L. 835 (about Afghanistan); and "Agora: Future Implications of the Iraq Conflict" (2004) 97(3) A.J.I.L. 553. For my own comparative analysis of the two cases, see Ian Johnstone, "US-UN Relations after Iraq: The End of the World (Order) as We Know It" (2004) 15 E.J.I.L. 813 at 827-836.

October 2001 was self-defense in connection with the events of 9/11.[2] This was a stretch from traditional interpretations of Article 51 of the UN Charter in two respects: (a) it was invoked against a non-state actor (Al-Qaeda); and (b) in exercising its right of self-defense, the US and its Afghan allies changed the regime in power in Afghanistan. Yet the international community was largely prepared to accept this interpretation of Article 51. Evidence that the Security Council itself saw the defensive response to 9/11 as legal is resolution 1368, adopted the day after the attacks, which contains a preambular paragraph reaffirming the inherent right of self-defense.[3] Many organizations, including NATO and the OAS, invoked the right of self-defense in support of the US, and some referred explicitly to resolution 1368 in doing so. The European Council stated on 21 September 2001 that "on the basis of Security Council resolution 1368, a riposte by the US is legitimate"[4], and on 8 October 2001, the EU's General Affairs Council declared "its wholehearted support for the action being taken in self-defence and in conformity with the UN Charter and UN Security Council resolution 1368".[5] Similarly, the Permanent Council of the OSCE expressed its support on 11 October 2001 for "the United States" and other states' rights of individual and collective self-defence following armed attacks, in accordance with Article 51 of the Charter of the United Nations, as reaffirmed in United Nations Security Council resolutions 1368 and 1373".[6] Moreover, many states participated directly or indirectly in Operation Enduring Freedom and are participating in the economic and political reconstruction of Afghanistan under the authority of Security Council resolutions 1386 and 1401, signifying implicit approval of the US interpretation of Article 51 as presented to the Security Council on 7 October.[7]

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2 John Bolton, "Letter from the Permanent Representative of the US to the President of the United Nations Security Council" (7 October 2001, UN Doc. S/2001/946).

3 SC Res. 1368, UN SCOR, UN Doc. S/RES/1368 (12 September 2001), online: United Nations ‹http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement›.

4 European Union, *Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001*, online: European Union ‹www.eurunion.org/partner/EUUSTerror/ExtrEurCounc.pdf›.

5 European Union, *General Affairs Council Conclusions: Action by the European Union Following the Attacks in the United States*, 8 October 2001, online: European Union ‹www.eurunion.org/partner/EUUSTerror/GenAffCounc1008.pdf›.

6 Organization for Security and Cooperation in Europe, *Statement by the Permanent Council supporting United States-led Actions to Counter Terrorism*", PC.JOUR/360/Corr.1, 11 October 2001, Annex. Online: Organization for Security and Cooperation in Europe ‹www.osce.org/documents/pc/2001/10/1695_en.pdf›.

7 For a fuller review of the reactions, see Ian Johnstone, "The Plea of 'Necessity' in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism" (2005) 43 Colum. J. Transnat'l L. 337 at 370-372.

When self-defense against terrorism was invoked eighteen months later as one of the justifications for military action against Iraq, the international reaction was quite different. In February 2003, US Secretary of State, Colin Powell presented evidence to the Security Council of Iraq's failure to comply with its WMD-related obligations and the connection between Saddam Hussein and Al-Qaeda. Implicitly, Secretary Powell was arguing that military action against Iraq could be justified on two distinct legal grounds: under the authority of Security Council resolutions and on the basis of self-defense. The doctrine of pre-emption was never the official US justification for military action in Iraq,[8] but by announcing it in the National Security Strategy of 2002 (NSS) and referring to it from time to time in the lead-up to war, the Bush Administration made it part of the debate. The central argument contained in the NSS is that Article 51 of the UN Charter permits "anticipatory self-defense", and that the notion of anticipatory self-defense can and does encompass pre-emptive strikes, including action to "forestall or prevent … hostile attacks by our enemies." Few states or knowledgeable observers were persuaded that the links between Saddam Hussein and Al-Qaeda were sufficiently tight to justify the invasion of Iraq as a defensive response to 9/11, and even fewer were prepared to endorse such an expansive doctrine of pre-emption. When that became obvious, the Bush Administration largely gave up trying to make its case on the grounds of self-defense—at least to international audiences. The letter of 20 March 2003 the US sent to the President of the Security Council setting out the legal justification for the war contains not a word about terrorism or pre-emption, and only a cryptic reference to the need to "defend the United States and the international community" in one of the final paragraphs.[9] The legal case is based on the enforcement of existing Security Council resolutions relating to Iraq's weapons of mass destruction.

Since then, there has been less talk of pre-emption in official US circles, although the doctrine is still on the books. The High-level Panel on Threats, Challenges and Change addressed the issue in December 2004 (hereinafter HLP), concluding that a threatened state can take military action pre-emptively in response to an imminent attack, but not preventively against a "non-imminent, non-

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8 See William Taft and Todd Buchwald, "Pre-Emption, Iraq and International Law" (2003) 97 A.J.I.L. 557.

9 John Bolton, "Letter from the Permanent Representative of the US to the President of the UN Security Council" (21 March 2003, UN Doc. S/2003/351). The cryptic reference could be interpreted as a nod to the right of self-defense against terrorism, although in the context of the letter as a whole, it is more plausibly read as a claim that, in enforcing Security Council resolutions, the US was defending collective interests, as is its responsibility as a member of the Council. If the US had wanted to make an Article 51 self-defense claim, it could have done so much more directly.

proximate" one.[10] On its face, this looks like a narrow interpretation of self-defense and a flat rejection of the NSS version of the doctrine of pre-emption. Yet according to one of its members, Brent Scowcroft, the Panel in effect "amplified" and "re-defined" Article 51 to accommodate unilateral pre-emptive self-defense against imminent threats, but not preventive action against more remote or distant threats.[11] Preventive action against "non-imminent" threats can and should be taken by the Security Council under its broad authority to maintain international peace and security. General Scowcroft stressed that the distinction between permissible pre-emption and impermissible prevention under Article 51 was important, but not a bright line. It remained to be worked out in practice.[12]

Where then, does the law on self-defense against terrorism stand post-Afghanistan and Iraq? Without trying to provide a full answer to the question, I would argue that it is usefully illuminated by the *accumulation of events* theory.[13] The theory relaxes the test of imminence when a state has been subject to a series or pattern of attacks.[14] If a state that suffered past attacks can present compelling

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10 *Report of the Secretary-General's on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, UN GAOR, 59th Sess., Supp. No. 565, UN Doc. A/59 (2004) at paras 188-189, online: United Nations ‹http://www.un.org/secureworld/ report.pdf›.

11 Woodrow Wilson International Center for Scholars, "Legitimacy and the Use of Force: Discussion on the United Nations' High-level Panel on Threats, Challenges and Change" March 23, 2005, available at ‹http://wilsoncenter.org/index.cfm?fuseaction=events.event_summary&event_id=11068›.

12 Proceedings of the 2005 Annual Conference of the American Society of International Law, April 2005 [forthcoming].

13 This section draws on my comments at the 2005 Annual Conference of the American Society of International Law, as well as Johnstone, *supra* note 8.

14 There is a respectable body of legal opinion to support this theory. It dates back to the debates over Israeli attacks on PLO headquarters in Tunisia in 1985 and US strikes on Tripoli in 1986, and was reinforced by the ICJ in both the *Nicaragua* case (1986) and *Iran Platforms* case (2003). Neither opinion is about terrorism, of course, but there is language in both to suggest that a pattern of events can be justification for a self-defensive response, even if a single incident in the pattern may not be. In the *Nicaragua* case, the Court said about incursions into Honduras and Costa Rica "[v]ery little information is however available to the Court as to the circumstances of these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly *or collectively*, to an "armed attack" by Nicaragua." *Military and Paramilitary Activities in and Against Nicaragua, Merits*, [1986] I.C.J. Rep. 14 at para. 231 [emphasis added]. In *the Iran Platforms* case, the Court ruled that "[*e*]*ven taken cumulatively*, these incidents [Iran committed such as the laying of mines and firing on ships]... do not seem to the Court to constitute an armed attack on the United States," implying that, on a different set of facts, a pattern of such attacks might justify a response in self-defense. *Case Concerning Oil Platforms (Islamic Republic of Iran v. U.S.)*, [2003] I.C.J. Rep. 90 at para. 50 [emphasis added]. For an analysis of the Oil Platforms case, see

evidence of both the source of the attacks and a genuine threat of future attacks from the same source, then a self-defensive response would be legal. In those circumstances, the test of imminence is not simply a matter of time, but also of the nature, likelihood and potential gravity of future attacks. The accumulation of events theory splits the difference between the NSS approach and that of the HLP since, on the one hand, the former did not call for an abandonment of the *imminence* test, just its adaptation; and on the other hand, the latter left wiggle room in its position by using the word *proximate* alongside *imminent*. Arguably, threats that are part of a pattern of events are "proximate" enough to justify self-defense.

More difficult legal questions arise when there has only been one past attack or none at all, just a threat. Even though there has been no "pattern" of attacks, the accumulation of events theory may be helpful as a way of gauging the likelihood and imminence of future attacks. Mary Ellen O'Connell has written that "clear and convincing evidence" of future attacks is the appropriate test, since that is an accepted standard in other areas of international law.[15] A past attack would certainly be an important piece of evidence—especially when followed by explicit threats of further attacks—and so, for example, the US would have been justified in acting against Al-Qaeda even if 9/11 had been its first attack on the US (which it was not).[16] Other relevant "events" would be a failed or thwarted attack, the discovery of written plans, or the apprehension of individuals engaged in specific planning. This looks like a slippery slope, but it is not so slippery that it would justify preventive action against all threats, no matter how remote. The military action against Iraq, for example, did not meet the test because there was no evidence of an "accumulation of events" to suggest Saddam Hussein was conspiring with Al-Qaeda to launch terrorist strikes on the US.

Whether or not this *accumulation of events* theory is persuasive, the important point is that much of the debate about pre-emption and the use of force against terrorism has radiated out of the UN Security Council. The debate did not occur there only, but because of resolution 1368, the letter the US sent to the Council

Natalia Ochoa-Ruiz and Esther Salamanca-Aguado, "Exploring the Limits of International Law Relating to the Use of Force in Self-Defense" (2005) 16 E.J.I.L. 499.

15 Mary Ellen O'Connell, "The Myth of Pre-emptive Self-Defense" (2002) A.S.I.L. Task Force on Terrorism 7.

16 Richard Gardner argues that the events of 9/11 alone constituted an "armed attack" against the US and gave rise to a self-defensive right to destroy Al-Qaeda's bases. Richard Gardner, "Neither Bush nor the 'Jurisprudes'" (2003) 97 A.J.I.L. 585 at 589. Thus there was no need to apply the *doctrine of pre-emption*, the *accumulation of events theory*, or for that matter even produce evidence of a possible future attack. The US response was part of an on-going war that began with 9/11. Personal communication with author (31 March 2005).

when it started military action in Afghanistan,[17] the debate about Iraq kicked off by President Bush in the UN General Assembly in September 2002, and the presentation of Secretary Powell in February 2003, the Security Council became a focal point for justificatory and condemnatory discourse. The contrasting reactions to the actions in Afghanistan and Iraq illuminate where the shifting law on self-defense against terrorism stands.

Humanitarian Intervention

The most illuminating way of understanding where the law relating to humanitarian intervention currently stands is to focus on the international reaction to NATO's intervention in Kosovo in 1999. Prior to Kosovo, the Security Council had been adopting a progressively more expansive interpretation of what constitutes a threat to international peace and security, which accommodated the use of force for humanitarian purposes. The developments occurred not as part of a systematic effort to rewrite the rules of international law, but rather as a case-by-case reaction to crises as they erupted and as a function of the political dynamics within the Security Council. No single decision represented a radical departure from existing international law and practice; taken together however, the decisions added up to a significant evolution in how the Security Council understood the scope and limits of its role.

This expansion can be traced through a series of cases, starting with the humanitarian operation in Northern Iraq in 1991, undertaken by the US, UK and France on the basis of ambiguous authority provided by Security Council resolution 688.[18] Subsequent steps in this progression were the operations in Bosnia, Somalia, Rwanda, Haiti and Sierra Leone. None was a pure case of humanitarian intervention, but by the time of the Kosovo crisis in late 1998-early 1999, the Security Council had authorized or endorsed a number of forcible interventions which were partly, if not exclusively, for humanitarian purposes. It was never sanguine about the use of force in these circumstances and each case was treated as unique, rather than as a principled application of a new doctrine of humanitarian intervention.

When NATO intervened in Kosovo, it did not have explicit Security Council authority and the weight of scholarly and official opinion is that the intervention was illegal. None of the three principal legal justifications—authority based on existing Security Council resolutions, a customary right of humanitarian

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17 John Bolton, "Letter from the Permanent Representative of the US to the President of the UN Security Council" (7 October 2001, UN Doc. S/2001/946).

18 Resolution 688 declares the consequences of Iraq's Kurd and Shi'ite populations to be a threat to international peace and security, but it was not explicitly adopted under Chapter VII, as all prior resolutions on Iraq had been. UNSC Res. 688, UN SCOR, 46th Year, UN Doc. S/RES/0688 (1991), online: United Nations ‹http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/596/24/IMG/NR059624.pdf?OpenElement›.

intervention or self-defense—was persuasive. However, a fair characterization of the international reaction to the intervention is that NATO's violation of the law was "excused". The "interpretive community"[19] of governments represented on the Security Council, other interested governments, lawyers, NGOs and blue ribbon panelists deemed the intervention illegal, but turned a blind eye to the violation of the law given the extreme circumstances.

This reading is supported by the many statements of government representatives who were disinclined to accept the legality of the intervention but reluctant to condemn it. This includes many Islamic countries, and even some NATO members who stressed the exceptional nature of the action and down-played its relevance as a precedent. The reaction of the Non-Aligned Movement (NAM) is especially revealing. At the time of the intervention in March 1999, the NAM refrained from directly condemning the action despite the efforts of South Africa as chair to get it to do so. Instead it merely affirmed NAM's belief in the Security Council as the appropriate conflict resolution body.[20] Yet, several months later, in response to the UN Secretary-General's speech to the General Assembly, NAM Ministers rejected the legality of unilateral humanitarian intervention.[21] The inference is that the NAM viewed the Kosovo intervention as illegal, but was prepared to excuse it at the time it occurred, while reaffirming the prohibition against use of force at the first appropriate opportunity. Even the US unwillingness to pin its case on a single legal justification can be seen as tacit acknowledgement that the action rested on shaky legal foundations but would likely be "excused". Then Secretary of State Madeleine Albright, a staunch proponent of the intervention, said after-the-fact that the Kosovo situation was *sui generis* and it was "important not to overdraw the lessons that come out of it."[22] This signals that the US was not trying to change the law in favor of a general doctrine of humanitarian intervention; it was deliberately and consciously acting in a manner it saw as contrary to the law (though it could not admit to that), in the hope and expectation that NATO action would be excused in the particular circumstances.

Since Kosovo, the notion of a "responsibility to protect" (R2P) has gained currency. First articulated by the International Commission on Intervention and

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19 On "interpretive communities", see Ian Johnstone, "Security Council Deliberations: The Power of the Better Argument" (2003) 14 E.J.I.L. 437 at 464-475, which applies the concept to an analysis of the arguments put forward to justify the Kosovo intervention.

20 Philip Nel, "South Africa: the Demand for Legitimate Multilateralism" in Albrecht Schnabel & Ramesh Thakur, eds., *Kosovo and the Challenge of Humanitarian Intervention* (New York: United Nations University Press, 2000) 240 at 245-246.

21 UN, Press Release, GA/SPD/164 (18 October 1999).

22 US Secretary of State Madeline Albright, Press Conference, (Singapore, 26 July 1999), online: U.S. Department of State ‹http://secretary.state.gov/www/statements/1999/990726b.html›.

State Sovereignty (ICISS), the central claim is that "where a population is suffering serious harm … and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect".[23] Early efforts to have the principle enshrined in a declaration by the General Assembly or Security Council faltered, but it has already informed debates on some issues. The R2P concept was invoked, for example, by virtually every member of the Council in deliberations on Darfur in late 2004 and early 2005.[24] Additionally, the SC resolution authorizing the African Union Mission in Sudan (AMIS) has an overarching humanitarian purpose.[25] The AU itself has articulated a version of the principle in its Constitutive Act and Protocol Relating to the Establishment of the Peace and Security Council. Both instruments grant the Union a right to intervene in a Member State "in respect of grave circumstances, namely war crimes, genocide and crimes against humanity" and, since 2003, a "serious threat to legitimate order."[26]

The effort to adopt the principle at the global level took on new life after the High-level Panel reported that there is a "growing acceptance" of the responsibility to protect against avoidable catastrophe and when Governments are unable or unwilling to fulfill that responsibility, it "should be taken up by the wider international community," including if necessary through the use of force.[27] The HLP stressed that the international responsibility falls on the Security Council and recommended the adoption of a set of guidelines or criteria to be taken into account

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23 ICISS, *Report of the International Commission on Intervention and State Sovereignty, the Responsibility to Protect* (International Development Research Center, 2001) at XI.

24 See, for example, the statements on resolution 1564, UN SCOR, 59th Year, UN Doc. S/PV.5040 (18 September 2004), online: United Nations ‹http://daccessdds.un.org/doc/UNDOC/PRO/N04/515/29/PDF/N0451529.pdf?OpenElement›.

As Nick Wheeler points out in this volume, the R2P principle was invoked both by states who sought to encourage outside intervention, either in the form of sanctions or military action, and those who opposed it.

25 African Union Peace and Security Council, Communiqué, PSC/PR/Comm (XVII), "Communiqué of the Seventeenth Meeting of the Peace and Security Council" (19 October 2004), online: Africa Union ‹http://www.africa-union.org/News_Events/Communiqu%C3%A9s/Communiqu%C3%A9%20_Eng%2020%20oct%202004.pdf›.

In addition to ceasefire monitoring, AMIS's mandate is to "contribute to a secure environment for the delivery of humanitarian relief and, beyond that, the return of IDPs and refugees to their homes," and to protect civilians and humanitarian operations "under imminent threat and in the immediate vicinity." The mandate is less robust than some would like, but that has more to do with a lack of capacity and prudential calculations about the overall prospects for peace in Sudan than principled objections to SC authorized humanitarian intervention.

26 *Constitutive Act of the African Union*, Article 4(h); Protocol Relating to the Establishment of the Peace and Security Council (2002), Article 4(j), as amended in February 2003.

27 *Supra* note 11 at para. 201.

in deciding whether to exercise it.[28] An early draft of the document that came out of the 2005 World Summit included a paragraph on the responsibility to protect, including the responsibility of the Security Council to act under Chapter VII when necessary.[29] The US objected to this language on the grounds that it implied a legal responsibility. As US Permanent Representative to the UN, John Bolton, put it in a letter to the President of the General Assembly:

> [W]e agree that the host state has a responsibility to protect its population from such atrocities, and we agree in a more general and moral sense that the international community has a responsibility to act when the host state allows such atrocities. But the responsibility of the other countries in the international community is not of the same character as the responsibility of the host, and thus we want to avoid formulations that suggest that the other countries are inheriting the same responsibilities that the host has.... [T]he obligation/responsibility discussed in the text is not of a legal character.... We do not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law.[30] Bolton's position was ultimately accepted. While the "responsibility to protect" language reframes the debate away from a more controversial right to intervene, it is not likely to be widely accepted if cast as an even more controversial "duty to intervene".

Responding to the US and other objections,[31] in a section of the Summit document entitled "Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity," language about the Council's responsibility to act was replaced with the following: the international community

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28 *Ibid.* at para. 203 and 207. The Secretary General endorsed this approach in his report, *In Larger Freedom: Towards Development, Security and Human Rights for All—Report of the Secretary-General*, UN GAOR, 59th Sess., UN Doc. A/59/2005 (2005), online: United Nations ‹http://daccessdds.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement›.

29 High Level Plenary Meeting of the General Assembly, *Revised Draft Outcome of the High-level Plenary Meeting of the General Assembly of September 2005 Submitted by the President of the General Assembly*, UN Doc. A/59/HLPM/CRP.1/Rev.2, (5 August 2005) at para. 118, online: Reform the UN ‹www.reformtheun.org/index.php?module=uploads&func=download&fileId=782&XARAYASID=ad45c8558a94a›.

30 Letter from Ambassador John Bolton, Permanent Representative of the United States of America to the UN, to the United Nations (30 August 2005), online: Reform the UN ‹http://www.reformtheun.org/index.php?module=uploads&func=download&fileId=811›.

31 US amendments are marked on the 5 August draft, in a document dated 17 August 2005 with the words "OD US Version #2" handwritten at the top, online: Reform the UN ‹http://www.reformtheun.org/index.php/countries/44?theme=alt1›.

is "prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII, on a case by case basis".[32] While there is no appeal to adopt guidelines or criteria for humanitarian intervention, the declaration "stresses the need for the General Assembly to continue consideration of the responsibility to protect… bearing in mind the principles of the Charter of the United Nations and international law."[33]

Thus, it would seem that, based on Security Council practice and debates emanating from that practice, the law on humanitarian intervention is as follows: the Security Council has the competence but not the duty to authorize humanitarian intervention; such intervention is illegal without Security Council authorization as a general matter; but there are rare cases of extreme humanitarian necessity when unauthorized action will in effect be excused by the international community.

The Use of Force to Protect Civilians in Peace Operations

Parallel to debates over a general responsibility to protect, a more specific debate has arisen over the responsibility of peacekeepers to protect civilians. While blue ribbon panels and now the UN have articulated the broad R2P norm, the Security Council has been mandating an increasing number of peace operations to protect civilians under Chapter VII of the UN Charter.[34]

The significance of this development is best understood in the context of the evolution of the peace operations doctrine within the United Nations. Historically and with few exceptions, peacekeeping was a consent-based enterprise and force was used only in self-defense. A sharp line was drawn between Chapter VI peacekeeping and Chapter VII enforcement action. The changed nature of the operations at the end of the Cold War led to a blurring of that line, highlighted by Secretary General Boutros-Ghali in his famous 1992 *Agenda for Peace* where he suggested consent was no longer a defining element of peacekeeping and peace enforcement units ought to be formed to occupy a halfway house between peacekeeping and enforcement action. In the 1995 *Supplement to an Agenda for Peace*, he backed away from that position and, reflecting on the failures in Bosnia and Somalia, insisted that peacekeeping and peace enforcement should not be mixed: "[t]o blur

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32 UN General Assembly, *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th Sess., UN Doc. A/RES/60/1 (2005), online: United Nations ‹http://daccessdds.un.org/doc/UNDOC/LTD/N05/511/30/PDF/N0551130.pdf?OpenElement›.

33 *Ibid.* at para. 139.

34 For an excellent review of the convergence between this normative shift and "protection of civilians" mandate of peace operations, see Victoria Holt, "Responsibility to Protect: Considering the Operational Capacity for Civilian Protection" (revised January 2005), online: Stimson Center ‹http://www.stimson.org/fopo/pdf/Stimson_CivPro_pre-pubdraftFeb04.pdf›.

the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel.... [P]eacekeeping and the use of force (other than in self-defense) should be seen as alternative techniques and not just as adjacent points on a continuum, permitting easy transition from one to another."[35] The sharp line the *Supplement* tried to draw was blurred again by the Report of the Panel on UN Peace Operations (the Brahimi Report, 2000). It affirms that consent, impartiality and the use of force only in self-defense remain the "bedrock principles of peacekeeping," but goes on to suggest that consent is often unreliable;[36] that impartiality does not mean neutrality but rather "adherence to the principles of the Charter and to the objectives of a mandate";[37] and that UN operations must be prepared to deal effectively with spoilers (groups who renege on their commitments or otherwise seek to undermine a peace accord by violence) and be able "to project credible force against the lingering forces of war and violence".[38] The blurring of the line was explicitly acknowledged by the HLP in 2004 when it states forthrightly that the distinction between Chapter VI peacekeeping and Chapter VII peace enforcement is "misleading"[39] and that the difference between the two should not be exaggerated.[40] "There *is* a distinction between operations in which the robust use of force is integral to the mission from the outset ... and operations in which there is a reasonable expectation that force may not be needed."[41] But the usual practice now is to give both types of operation a Chapter VII mandate, on the understanding that even the most benign environment can turn sour.[42]

This back and forth on the use of force suggests that the UN ought to have a peace operations "doctrine", but due to political sensitivities it does not possess, other than what appears in training manuals, a master list of standard rules of engagement, and various semi-official documents like the 2003 *UN Handbook on Multilateral Peacekeeping Operations.* As a result, there is no set policy on the responsibility of peacekeepers to protect civilians. The Brahimi panel tried to set such a policy by insisting that UN peacekeepers "who witness violence against

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35 Report of the Secretary-General on the Work of the Organization, *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc. No. A/50/60 – S/1995/1 (3 January 1995) at paras. 35 and 36, online: United Nations ‹http://www.un.org/Docs/SG/agsupp.html›.

36 *Report of the Panel on UN Peace Operations*, UN Doc. A/55/305-S/2000/809 (2000) at para. 48, online: United Nations ‹http://www.un.org/peace/reports/peace_operations/›.

37 *Ibid.* at para. 50.

38 *Ibid.* at paras. 21 and 51, and Executive Summary. On *spoilers* more generally, see Stephen Stedman, "Spoiler Problems in Peace Processes" (1997) 22 I.S. 5.

39 *Supra* note 11 at paras. 211-212.

40 *Ibid.* at para. 213.

41 *Ibid.* at para 212 [emphasis in original].

42 *Ibid*.

civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles."[43] The latest version of the *Handbook on Peacekeeping*, on the other hand, states: "in specific circumstances, the mandate of a peacekeeping operation *may include* the need to protect a vulnerable civilian population from imminent attack. The military component *may be asked* to provide such protection in its area of deployment only if it has the capacity to do so."[44] The implication is that there is no obligation to protect civilians unless explicitly stated in the mandate.

Meanwhile, as is often the case in peace operations, practice has moved ahead of theory. Since late 1999, no fewer than ten operations—both UN and non-UN—have been given mandates under Chapter VII "to protect civilians under the imminent threat of physical violence."[45] This language is often qualified by the words "within its capabilities and areas of deployment" Thus the peacekeepers do not have a blanket responsibility to protect all civilians, which would generate expectations that could rarely be met. However, it is now standard practice to include this more limited protection mandate in every operation where consent of all the parties to the conflict is unreliable, or worse, non-existent.[46]

This development is not entirely new. Since the end of the Cold War, a substantial number of missions have had *implicit* mandates to protect civilians, even if the precise term was not used. The United Nations Protection Force (UNPROFOR) in Bosnia, for example, had a mandate to "deter attacks against the safe areas".[47] The Implementation Force (IFOR) and Stabilization Force (SFOR), the NATO-led missions that succeeded UNPROFOR, had broad mandates to use "all necessary measures" to carry out their missions, which included support for humanitarian functions and the authority "to respond appropriately to deliberate

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43 *Supra* note 38 at para. 62.

44 UN, *Handbook on UN Multilateral Peacekeeping Operations* (2003), at 64, online: United Nations ‹http://pbpu.unlb.org/pbpu/handbook/Handbook%20on%20UN%20PKOs.pdf›

45 For UN operations, see for example UNSC Res. 1270, UN SCOR, UN Doc. S/RES/1270 (1999) on Sierra Leone; UNSC Res. 1291, UN SCOR, UN Doc. S/RES/1291 (2000) on DRC; UNSC Res. 1528, UN SCOR, UN Doc. S/RES/1528 (2004) on Cote d'Ivoire; UNSC Res. 1542, UN SCOR, UN Doc. S/RES/1524 (2004) on Haiti; UNSC Res. 1545, UN SCOR, UN Doc. S/RES/1545 (2004) on Burundi ; UNSC Res. 1590, UN SCOR, UN Doc. S/RES/1590 (2005) on Sudan (2005); and UNSC Res. 1609, UN SCOR, UN Doc. S/RES/1609 (2006) on Cote d'Ivoire. For non-UN operations, see UNSC Res. 1464, UN SCOR, UN Doc. S/RES/1464 (2003 on the French-led Operation Licorne and ECOWAS in Cote d'Ivoire; and UNSC Res. 1564, UN SCOR, UN Doc. S/RES/1564 (2004) on the African Union in Darfur.

46 The Government of Canada played a central role in insisting that this should become standard language in Security Council resolutions.

47 UNSC Res. 836, UN SCOR, UN Doc. S/RES/836, (1993)

violence to life and person".[48] The UN- and US-led missions in Somalia had mandates to establish a secure environment for humanitarian operations.[49] The French-led Operation Turquoise had a mandate to provide "security and protection of displaced persons, refugees and civilians at risk",[50] Protection of civilians falls within the mandate of the NATO-led force in Kosovo (KFOR)[51], as it did with the International Force in East Timor (INTERFET) and then the UN Transitional Administration in East Timor (UNTAET) prior to Timor-Leste becoming independent.[52]

The protection of civilians has not been exercised consistently and indeed there are places, such as the Democratic Republic of Congo, Côte d'Ivoire and Sudan, where it is doubtful the missions have the capacity to fulfill the commitment. Yet there have been a good number of situations in recent years where peace operations have acted robustly to protect civilians—with good results and general acceptance.[53] It is too early to say that stopping "violence against civilians" is *presumed* to be in the mandate of all peace operations, but clearly there is a move in that direction. Failure to do so could be seen as inconsistent with UN Charter principles and therefore inconsistent with the principle of impartiality as defined in the Brahimi report. The mandates and activities of the peace operations reflect the normative shift signified by endorsement of the "responsibility to protect" principle. Arguably, they are a concrete manifestation of efforts to put the principle into practice—not as dramatic as a full-scale humanitarian intervention, but nevertheless part of the incremental process of giving meaning and content to an inchoate norm. Again, this normative evolution has occurred as a result of Security Council practice and discourse in and around the Security Council about the practice.

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48 UNSC Res. 1031, UN SCOR, UN Doc. S/RES/1031 (1995); UNSC Res. 1088, UN SCOR, UN Doc. S/RES/1088 (1996).

49 UNSC Res. 794, UN SCOR, UN Doc.S/RES/794 (1992); UNSC Res. 814, UN SCOR, UN Doc S/RES/814 (1993).

50 UNSC Res. 925, UN SCOR, UN Doc S/RES/925 (1994); UNSC Res. 929, UN SCOR, UN Doc S/RES/929 (1994).

51 UNSC Res. 1244, UN SCOR, UN Doc S/RES/1244 (1999).

52 UNSC Res. 1264, UN SCOR, UN Doc S/RES/1264 (1999); UNSC Res. 1272, UN SCOR, UN Doc. S/RES/1272 (1999).

53 Non-UN operations like SFOR (Bosnia), KFOR (Kosovo), INTERFET (East Timor), Operation Artemis (DRC), AMIB (Burundi) and AMIS (Darfur) come to mind, as do a number of UN missions, including UNAMSIL (Sierra Leone), MINUSTAH (Haiti), MONUC (Democratic Republic of the Congo) and ONUB (Burundi).

THE SECURITY COUNCIL AS A DELIBERATIVE BODY

Deliberation Matters

Some of these use of force issues were addressed at the 2005 World Summit, but only R2P was a major topic of discussion. The result of the negotiations on that issue was the first ever UN-wide, consensus-based endorsement of the principle, in surprisingly unequivocal terms. The various drafts and final outcome document were virtually silent on self-defense and pre-emption. They reaffirmed that Charter provisions were sufficient to address "the full range of security threats" and, in a brief reference to the notion of criteria for intervention (see below), early drafts recognized the need to continue discussing principles for the use of force.[54] A penultimate draft included a square bracketed amendment that "the use of force should be considered an instrument of last resort," as well as a determination "to enhance the consistent application of non-use of force in international relations."[55] All of that language was removed from the final declaration, as was the reference to criteria for intervention. In the end, the Summit simply reaffirmed the UN Charter. While a good deal of energy and attention was devoted to the new Peacebuilding Commission, on peace operations themselves, the summit said UN operations should have "adequate capacity to counter hostilities and fulfill effectively their mandates"[56]—a hint at robustness, but nothing about the responsibility to protect civilians. Given the Summit's roots in the HLP report, which itself was prompted by a "fork in the road" identified by the SG following Iraq, that so little was said about use of force issues shows how difficult effective deliberation among 191 states can be.

On the other hand, as my review of the three areas of evolving law suggests, a great deal of debate and deliberation about the use of force takes place in and around the Security Council. This is true not only when the Council itself is contemplating military action, but also with respect to unilateral action, either because some state is seeking implicit or explicit support for its use of force in self-defense (as with Afghanistan and, to an extent, Iraq) or other states are seeking to condemn and constrain the use of force (as with Kosovo). Governments that are members of an international institution feel compelled to justify their conduct and defend their behavior in terms of the norms of that institution. The question is not whether the debates occur—it is easy to find evidence of them in and around the Security Council—but whether they matter. Does deliberation on the basis of law and norms matter when it comes to the use of force, or is it mere rhetorical jousting with no impact on behavior? A social scientist could try to answer that question by

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54 *Supra* note 30 at para. 54-56.

55 *Draft Negotiated Document*, *12 September 2005, 12:30 pm*, online: Reform the UN ‹http://www.reformtheun.org/index.php?module=uploads&func=download&fileId=828›

56 *Supra* note 34 at para. 92.

marshalling empirical evidence. He or she could seek to determine, for example, whether the uncertain legality of the war in Iraq generated diplomatic, political and economic costs to the US, beyond the costs associated with policy differences over the wisdom of the action. Evidence that some states (like Turkey) could have been induced to support the US more actively in the war and its aftermath if they saw it as legal would be relevant. Gathering that kind of empirical evidence would be difficult but not impossible.

An easier way of answering the question—perhaps counter-intuitive—is to look at the length to which states go to *avoid* deliberating on the basis of law and norms. This is circumstantial evidence that states believe deliberations matter (why else work so hard to ensure they do not come under unwelcome pressure to discuss and debate an issue before acting?). Consider, for example, the intense opposition to the adoption of criteria for intervention, as proposed by both the HLP and the Secretary-General, picking up on the suggestion made by the ICISS.[57] The underlying rationale for such criteria set out by the HLP is that the effectiveness and legitimacy of decisions about the use of force depend on the common perception of "their being made on solid evidentiary grounds, and for *the right reasons* ...."[58] Criteria for intervention are designed to improve the quality of deliberations in the Council, in the hope that this will lead to more transparent decision-making, and more effective and more widely respected decisions.[59] At least part of the logic seems to be that decision-makers must make their case for a decision on the basis of reasons that are shared or can be shared by all who are affected, even if they do not agree with the decision itself. Deliberation on the basis of agreed standards injects an element of impartial argumentation into the process, mitigating if only slightly the effects of material power, calculations of national interests and vote-trading or buying.[60] It was hoped that criteria for intervention would improve accountability by both deterring illegitimate action and generating political will for legitimate action.

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57 In fact the High-level Panel and Secretary-General go further than the ICISS by proposing a set of generic guidelines that would apply to any use of force, whether for humanitarian or other reasons. High-level Panel report, *supra* note 11 at para 207; *In Larger Freedom*, *supra* note 29 at para. 126; ICISS, *supra* note 24, "Synopsis" at XII.

58 *Supra* note 11 at para. 204 [emphasis added].

59 *Ibid.* at paras. 204-207; and *In Larger Freedom*, *supra* note 29 at para. 127.

60 The theoretical roots of that line of argument are in the theory of deliberative democracy, which holds that decisions must be justified in terms those who are subject to them can accept. See Ian Johnstone, "Deliberative Legitimacy in International Decision-Making" in Hilary Charlesworth & Jean-Marc Coicaud, eds., *The Faultlines of Legitimacy* [forthcoming in 2006] and Ian Johnstone, "Deliberating and Legislating in the Security Council" in Bruce Cronin & Ian Hurd, eds., *Virtual Authority in the UN Security Council* [forthcoming] ["Deliberating and Legislating"].

Opponents to the adoption of criteria outnumber proponents by a large margin. The US is opposed for three related reasons: (a) it does not want the Security Council to be constrained in how it responds to threats posed by terrorism and weapons of mass destruction; (b) it worries about coming under unwelcome pressure to act in response to humanitarian crises; and (c) it fears a spillover into the realm of unilateral action. While the criteria are designed for Security Council deliberations, they could be invoked by NGOs and others when unilateral military action is being contemplated, compelling the US to offer justifications on the basis of criteria that it fears could be unduly constraining or bring unwelcome pressure to act. Many developing countries are opposed for similar reasons: they will be used to legitimize military action when not appropriate, or, although less of a concern to most developing countries with the exception of some in Africa, to constrain it when it would be appropriate.

What is more interesting about both the proposal for criteria and the expressed concerns about them is that they reflect an implicit assumption that deliberation and persuasion somehow matter, even when it comes to decisions about the use of force. The guidelines, after all, are nothing more than a set of questions the members of the Security Council should ask themselves each time the issue of intervention arises. They are not binding, nor are they even framed as triggering criteria meant to produce an automatic response. They are in effect an invitation to debate and deliberate on the basis of agreed standards.

Why, one might reasonably ask, should anyone expect the Council to be more effective in dealing with threats like terrorism and genocide simply because a set of non-binding debating principles have been adopted? [61] Conversely why would anyone be concerned that the adoption of such principles will either constrain or generate pressure for action? Both those who support and those who oppose the adoption of criteria seem to share a view that runs counter to one of the fundamental premises of political realism: that material power and hard bargaining over interests are all that matter in the Security Council, and that deliberation and persuasion on the basis of norms count for nothing. One would assume that decisions about intervention come down to political will, not legal quibbles. Yet, interestingly, both the proponents and opponents of criteria seem to think that legal quibbles do matter—either for generating or deflecting political will.[62]

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61 And this line of questioning comes not only from realists in the US. In an article in *The Indian Express*, the author ridiculed "sentimentalists in India [who] have often viewed the UN as some kind of a world parliament that deliberates and acts in a just manner." It is not, the author continued. "Its decisions are the product of crass political bargaining among the P5. The UN can't transcend the balance of power."

62 In commenting on this paper at the JILIR conference on 7 October 2005, Ambassador Paul Heinbecker—a diplomat with extensive Security Council experience—affirmed that deliberation and legal arguments do matter in the Council. He cited the series of

Proposals for Security Council Reform

The power of the Security Council derives in large part from its composition, voting rights and formal authority to adopt binding decisions. But it is not only a place where the five permanent members (P5) bargain over their interests and adopt resolutions to advance them. It is also a place where the terms of appropriate international behavior are defined, debated, interpreted and reinterpreted. Those deliberations occur not only among the 15 members of the Council, or some small sub-set of them, but among a broader range of actors. The actors are not all equal participants of course, but it is inaccurate to suggest that decisions come down entirely to the relative power of the principal actors.

The Council can be conceived as a four-tier deliberative setting.[63] The top tier is composed of the five permanent members who have equal voting power and engage in deliberations on relatively free and equal terms. The second tier is the Security Council as a whole. The votes of the non-permanent members count for less than those of the P5, because they lack veto power, but any of the P5 that wants to pass a resolution must solicit their support, sometimes competing with other P5 states soliciting votes for a counter resolution. They contribute to the deliberative process by setting the parameters of the more equal deliberations among the P5. The third tier is the rest of the UN membership, who do not have votes in the Security Council, but, in principle at least, can act as a loyal opposition. They have some opportunity to participate in debates, in open Council meetings for example, or as troop contributors to peace operations. And for Council decisions on most peace operations to be effective, there must be a substantial degree of buy-in among them, especially when the members of the Council are not offering troops. The fourth tier is the constellation of experts (lawyers, pundits and policy analysts), engaged representatives of non-governmental organizations, organs of international public opinion and other citizens who have a stake in and keep a close watch on what is going on in the Security Council. One not need invoke a mythical "international community" to make the case that the members of the Council feel compelled to appeal to networks of actors and citizens beyond governmental chambers. This network is part of a broad interpretive community, whose judgment—real or anticipated—matters to governmental decision-makers. They wield indirect influence even over closed door deliberations in the Security Council because

resolutions deferring investigation and prosecutions by the International Criminal Court of peacekeepers and officials from non-ICC parties. See SC Res. 1422 (2002) and 1487 (2003). In Ambassador Heinbecker's view, these resolutions were clearly *ultra vires* the Council because they imply either that peacekeeping or the ICC is a threat to international peace and security (the threshold for action under Chapter VII), neither of which is plausible. He argued that the decision of the Council not to renew the deferral in 2004 was due in part to the power of these legal arguments.

63 I elaborate on this notion of the Council as a four-tier deliberative setting in Johnstone, "Deliberating and Legislating", *supra* note 56.

debates in private are animated by arguments that will be used later to justify positions in public.

Conceiving of the Security Council in this way suggests that improving its effectiveness depends in part on improving the quality of its deliberations. This is a thread that runs through debates on Council reform. Consider, for example, the synopsis of the relevant section of the HLP report:

> The Charter of the UN provided the most powerful states with permanent membership on the Security Council and the veto. In exchange, they were expected to use their power for the common good and promote and obey international law.... In approaching the issue of UN reform, it is as important today as it was in 1945 to combine power with principle. Recommendations that ignore underlying power realities will be doomed to failure or irrelevance, but recommendations that simply reflect raw distributions of power and make no effort to bolster international principles are unlikely to gain the widespread adherence required to shift international behaviour.[64]

In effect, the Charter is a bargain between the P5 and the rest of the world; the P5 get special privileges, in exchange for which they are expected to exercise those privileges in a manner that upholds the Charter-based normative order. The HLP goes on to say that effective SC decision-making requires greater "consultation" with those who must implement decisions.[65] The success of a sanctions regime or "legislative" action, like resolutions 1373 (on the suppression of financing and other forms of support for terrorism) and 1540 (designed to prevent WMD from falling in to the hands of terrorists), requires the proactive cooperation of many governments as well as non-governmental actors. The relevant constituencies—those affected by these sorts of resolution—are enormous. Obviously, there are practical limits on the scope of consultations, but direct participation is not the only thing that matters. Equally important, those directly engaged must address their reasons for action to those most affected, taking their concerns into account, even if they have no vote or say over the decision.

This is reinforced by the HLP's call for a system of *indicative voting* as a way of increasing the accountability of the veto function.[66] The rationale seems to be that governments who are required to announce their positions publicly prior to an actual vote will be less likely to cast a veto if the reasons for it are unlikely to pass muster in the court of international public opinion. And the HLP welcomes the

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64 "Synopsis," *supra* note 11, at 64.

65 *Supra* note 11 at para. 248.

66 *Ibid.* at para. 257.

impact of "greater civil society engagement in the work of the Security Council,"[67] which is felt not primarily in terms of direct participation but through the audience effect. Engaged civil society representatives serve as stand-ins for the broader constituency of all those affected by SC decisions. They are the audience to whom good reasons must be addressed and who have ways of expressing their displeasure if they do not like what they hear. Knowing these representatives of civil society are listening attentively, the speakers measure their words, aware that not any argument will fly.

The HLP's proposals sparked a lively debate on Security Council reform, which centered on expansion of the permanent membership. The so-called G-4, composed of Brazil, Germany, India and Japan, tabled a resolution in the General Assembly that would have created six new permanent seats without veto and four non-permanent seats. Though no states were mentioned by name, the likely six were the G-4 plus two of three African countries: Nigeria, South Africa and Egypt. To counter allegations that adding six new great powers would not go far towards diminishing the "undemocratic" and "hereditary" manner in which Council seats are allocated,[68] the G-4 draft includes detailed proposals for improving working methods in the Council to enhance its "transparency, inclusiveness and legitimacy." Thus, for example, they propose SC meetings in public as a general rule, regular consultation with non-members of the Council, making draft resolutions available immediately and holding timely meetings with troop and financial contributors to a peace operation.

The most trenchant criticism of the proposal is that none of the six can be expected to represent their regions as a whole.[69] A more subtle criticism is that if eleven of the world's great powers have a permanent seat at the table there will be less incentive to consult more broadly. The current P5 may be able to authorize a coalition of the willing to engage in military action without much support, but they will not and can not do all the heavy lifting of peacekeeping on their own, let alone enforce sanctions or coercively impose terrorism legislation on 186 member states. They must reach out. A P11 may feel less of a need to do so, making the Council less democratic.

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67 *Ibid.* at para. 260.

68 James Paul and Celine Nahory, "Theses towards a Democratic Reform of the UN Security Council" (13 July 2005) *Global Policy Forum* 4.

69 Beyond that, Italy accused two of the G-4 of "improper and unethical" behavior in trying to secure votes for their bids by offering aid or threatening to cut it off. The Italian Ambassador called this a "distortion of the democratic will." See Statement of the Permanent Representative of Italy to the UN General Assembly, 26 July 2005, online: Permanent Mission of Italy to the United Nations ‹http://www.italyun.org/docs/statemen/2005_07_26_spatafora.htm› . See also Statement of Permanent Representative of Pakistan.

A rival resolution, introduced by the Uniting for Consensus group (comprised of regional rivals of the G-4—Italy, Mexico, Argentina and Pakistan—as well as Canada), calls for no new permanent members and ten new non-permanent members. The one concession to permanence would be to remove the prohibition against re-election. Canada's Permanent Representative to the UN defended the proposal in these terms:

> First, it is democratic. At a time when so many of us promote democratic principles of governance, is it not essential that we reflect those same principles in our own governance: in the crucial decision about which member states will serve on the UN's most powerful body? Is it not fundamental that where regions are accorded a permanent presence, those who serve on the Council must manifestly hold the continuing confidence of their regional colleagues, tested and expressed at intervals that the regional members consider appropriate?.... Second, the approach provided for in Resolution L.68 makes the Council more accountable to member states. Permanence is the polar opposite of accountability. Permanence produces positions that reflect national perspectives. Permanence claims the power of the office as of right, and forevermore. Resolution L.68 takes a different approach.... [I]t draws on more contemporary values in proposing an enlarged council in which membership is earned, by winning and keeping the confidence of your peers. Apart from being sound in principle, the accountability that is inherent in this approach is also more likely to produce a Security Council in which regional and global concerns predominate over national interests.[70]

The appeal for a more democratic and accountable Council echoes a refrain heard often in the US, among both proponents of UN reform and skeptics who doubt the UN can ever be reformed, precisely because it is a deeply undemocratic institution.[71]

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[70] Statement by Ambassador Allan Rock, Permanent Representative of Canada to the United Nations General Assembly, introducing draft Resolution A/59/L.68 under Agenda Item 53: Question of the equitable representation on and increase in the membership of the Security Council and related matters (26 July 2005), online: Canadian International Policy Library ‹http://www.dfait-maeci.gc.ca/cip-pic/library/securitycouncil-en.asp›.

[71] See two speeches by Kim Holmes, Assistant Secretary of State for International Organization Affairs, "The Challenges Facing the UN Today: An American View" (Remarks before the Council on Foreign Relations, 21 October 2003); "Why the UN Matters to U.S. Foreign Policy" (Remarks before the Baltimore Council on Foreign Affairs, 6 December 2004). A more skeptical view is expressed by Charles Hill, former aide to Secretaries of State Schultz and Kissinger, "How to save the UN (if we really have to)" *The Wall Street Journal* (7 December 2004) A14. Neither view, of course is confined to the US. The Ottawa Citizen ran an editorial shortly after the HLP report came out

This begs a question: what does democratization of the Security Council mean? A full answer to that complex question is beyond the scope of this paper, but following the logic of deliberative democracy, it would seem that many of the protagonists in the debate on Council reform believe making the Council a better venue for deliberation is one way of making it more democratic. This does not necessarily require a larger or even more representative Council in voting terms, but rather one where there is greater *involvement of non-members*, *accountability* and *transparency* in its work.[72]

Conclusion

The Security Council operates within a normative climate that it in turn shapes. Legal norms relating to self-defense, humanitarian intervention and the use of force by peacekeepers have evolved, in part because of the practice and deliberations of the Security Council.[73] The P5 wield the lion's share of power in those deliberations,

stating that the UNs problem was that "undemocratic countries enjoy the power of sheer numbers." "Is it really better," the Citizen asked, "to have a giant collection of illiberal non-democracies acting multilaterally than to have liberal democracies acting unilaterally?" "UN reform is overdue" *Ottawa Citizen* (4 December 2004) B6.

72 *Supra* note 34 at para. 154.

73 In this paper, I have focused on legal norms without drawing a sharp distinction between legal norms and social or other kinds of norms. But the distinction does matter, as Brunée and Toope have argued persuasively. Jutta Brunée and Stephen J. Toope,

which they use not only to advance their interests but also to reshape the international legal order. The US wields the most influence,[74] but not in direct proportion to its material power precisely because the normative climate surrounding the institution—which it helped to shape—influences the deliberations within it. From this perspective, the Council is an arena for pushing the limits of the law, while compelling a form of discourse that makes it difficult to stretch those limits beyond recognition.

"International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum. J. Transnat'l L. 19. And the distinction is important in Security Council deliberations, because legal norms have greater discursive bite than less precise, less binding norms. The difference is a matter of degree rather than kind, but to illustrate the point consider the following two lines of argument a government representative may make in any inter-governmental setting: (1) "we know what the law is, but in the current circumstances we must ignore it" and (2) "we know what accepted behavior is but in the current circumstances we must behave differently." The former is much more likely to meet resistance through counter-arguments than the latter.

74 Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order" (2005) 16 E.J.I.L. 369.