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## The UN Security Council and the Saga of “Global Legislation”

*Gadi Ezra*

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### CONTENTS

I.	Introduction.....	94
II.	Defining Global Legislation.....	98
III.	The Security Council as a Global Legislator.....	107
	A. Authority to Engage in Legislation Under the UN Charter ..	108
	B. Appropriateness in Functioning as a Global Legislator .....	113
IV.	Case-Specific “Threat to Peace” and Thematic Resolutions.....	127
	A. Case-Specific “Threat to Peace” Resolutions .....	128
	B. Thematic Resolutions .....	132
V.	Conclusion.....	139

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## I. INTRODUCTION

The UN Security Council (the Council) is probably the world's most important entity as regards international law and security. Highlighting its unique status and occasional success in providing lawyers with coherent legal guidance in a global system lacking a single legislative organ, Jose Alvarez has romantically claimed it is the *deus ex machina*, or perhaps "god in the wings," of international law.<sup>1</sup> While the authorities granted to the Council within the UN Charter (the Charter) already make it powerful, an examination of its conduct reveals that it is, as a matter of fact, a complex body that has consistently pursued the expansion of its competence. This tendency became prominent during the 1990s following the Cold War years, which had been characterized by infrequent use of the Council's Chapter VII authorities, primarily due to the veto mechanism.<sup>2</sup> Recognizing "a time of momentous change," in which "the ending of the cold war has raised hopes for a safer, more equitable and more humane world," the Council chose to express its "commitment to collective security"<sup>3</sup> by extensively using its powers.<sup>4</sup> It has gradually adopted a variety of enforcement measures under Chapter VII, from economic embargoes to the authorization for States to use force, which have influenced the course of international law and relations.<sup>5</sup> Some have even been considered innovative, as Matthew Happold has noted:

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1. Jose E. Alvarez, *Between Law and Power*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 926 (2005) (reviewing ERIKA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL* (2004), and DAVID M. MALONE, *THE UN SECURITY COUNCIL FROM THE COLD WAR TO THE 21ST CENTURY* (2004)).

2. *See generally* DE WET, *supra* note 1 (mentioning that prior to the Cold War, the Council adopted Chapter VII measures only twice—when it imposed economic sanctions on South Rhodesia in 1966 and military sanctions against the South African apartheid regime in 1977); *see also* SYDNEY D. BAILEY & SAM DAWS, *THE PROCEDURES OF THE U.N. SECURITY COUNCIL* 13 (3d ed. 1998) (demonstrating that since the 1990s, the Council has used Chapter VII-based resolutions more than 250 times, as well as multiple enforcement measures).

3. *See* S.C. Press Statement S/23500 (Jan. 31, 1992).

4. *See infra* Part III(B) (as will be demonstrated below, the Council expanded its powers, particularly under Articles 41 and 42 of the Charter, through an expanded interpretation of the "threat to peace" concept, anchored in Article 39 of the Charter).

5. *See* Eric Rosand, *The Security Council As "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 FORDHAM INTERNATIONAL LAW JOURNAL 542, 561 (2004).

[T]he techniques employed by the Council [following the Cold War] “to maintain or restore international peace and security” were frequently innovative, including not only those mentioned in the Charter, such as sanctions and military force, but the delimitation of international boundaries, the awarding of compensation, the establishment of international criminal tribunals, demands for the surrender of individuals, and the creation of international protectorates.<sup>6</sup>

The Council’s expanded activity has raised substantive questions regarding its nature, meaning, and implications. These questions have become most acute regarding what is termed in the literature as its “global legislation.”<sup>7</sup> The two main manifestations of such alleged global legislation are either a *thematic resolution*, or *general rules or obligations within a case-specific “threat to peace” resolution*.<sup>8</sup> These resolutions will be named “legislative resolutions” in this article and are central to its thesis.

Although it is used often in the legal literature, the term global legislation is vague and contested. Scholarly work occasionally discusses the Council’s alleged global legislation but without initially offering a proper working definition of the term. Arguments both for and against are frequently laid incoherently and can roughly be divided into two types: those assessing the Council’s *authority* to engage in global legislation, and those assessing the *appropriateness* of such conduct. These arguments will be presented in this article accordingly. As a working definition for this article, however, global legislation in the Council’s context means the issuance of binding resolutions or general rules that apply *to all States at all times* and are not associated with any specific situation.<sup>9</sup> The different arguments, regarding either the Council’s authority to engage in global legislation or the appropriateness of its conduct, will be examined in light of this working definition.

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6. Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN JOURNAL OF INTERNATIONAL LAW 593, 594 (2003) (footnote omitted).

7. *Id.*; see also Roele, *infra* note 52; Breakey, *infra* note 33; Fraser, *infra* note 10; Kirgis, *infra* note 68; Charney, *infra* note 25.

8. “General rules or obligations within a case-specific ‘threat to peace’ resolution” refers to rules or obligations that apply towards external matters or actors to a particular “threat to peace” resolution.

9. This working definition is based on Edward Yemin’s definition of “legislation” rather than “global legislation,” which is a controversial term and deviates from different definitions of “global legislation,” for which see *infra* Part II.

The discussion regarding the Council as a global legislator has led to deep controversy. There are legitimate claims on both sides of the debates concerning the Council's *authority* to engage in global legislation and its *appropriateness*. On the one hand, various scholars recognize a legitimate and gradual process which has culminated in the Council's adoption of legislative, or at least quasi-legislative, capacities.<sup>10</sup> Nico Krisch accordingly has claimed that "[b]y means of its enforcement powers, the Security Council has in fact replaced the conventional law-making process on the international level."<sup>11</sup> On the other hand, others have objected to the very notion that an organ of an international organization (IO) such as the Council is engaged in any form of "legislation" under Chapter VII.

This article's aim is to highlight the controversy regarding the Council's global legislation attempts and stress the need for a policy-based solution that addresses the concerns it raises. Thus, it analyzes the different concerns relating to the Security Council's capacity to undertake global legislation and suggests considerations that should inform a policy-based solution to address them. Ultimately, it suggests that a proper solution needs to satisfy two conditions. First, it should not be unduly restrictive, in order to allow the Council to operate effectively, considering its central role in maintaining international peace and security. Second, it should not be too broad, in order to restrain the Council from abusing its powers. As such, this article provides a comprehensive perspective on the Council's global legislation attempts, as well as a point of departure—for scholars and practitioners alike—for designing such a policy-based solution.

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10. See Trudy Fraser, *Conclusion: The Security Council as Global Legislator*, in *THE SECURITY COUNCIL AS GLOBAL LEGISLATOR*, 289–90 (Vesselin Popovski & Trudy Fraser eds., 2014); see also Frederic L. Kirgis, *Security Council Resolution 1483 on the Rebuilding of Iraq*, *AMERICAN SOCIETY OF INTERNATIONAL LAW INSIGHTS* (June 6, 2013), <https://www.asil.org/insights/volume/8/issue/13/security-council-resolution-1483-rebuilding-iraq> (noting that the Council has even adopted judicial capacities, as was demonstrated in 2003 within Resolution 1483, which labeled the United States and the United Kingdom as "occupying powers" in Iraq who bear responsibility to comply with their obligations under international law; Kirgis states that the UN Charter does not formally grant the Council the "power to adjudicate," yet this kind of authority seems to be drawn from Chapter VII, which mandates the Council to restore international peace and security).

11. Nico Krisch, *The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VS. LIBERTY?* 879, 884 (Christian Walter et al. eds., 2004).

Indeed, international law is driven and created primarily by States.<sup>12</sup> In common practice, IOs are scarcely ascribed any global legislative abilities.<sup>13</sup> Contemporary threats such as global terrorism or the erosion of the global governance concept,<sup>14</sup> however, might dictate otherwise. The Council, in this sense, is in the midst of a long saga concerning its global legislation competences. Recognizing this issue, while rethinking its meaning and implications, is much needed. Over two decades ago, Louis Henkin considered “new threats” and asked, “Should we be thinking of changing the laws of law-making—as in fact the world did in 1945 when it established the U.N. Security Council?”<sup>15</sup> This question seems to be as relevant today as it was in 1945.

To answer this question, this article will begin by defining “Global Legislation” in Part II. Then, in Part III, it will inquire whether the Council can and should be considered a “Global Legislator.” To do that, it will examine the Council’s functionality as a “Global Legislator” through two types of arguments that arise in the extended corpus of writing. The first concerns the Council’s *authority* to engage in global legislation under the UN Charter while the second discusses the *appropriateness* of its conduct. Next, in Part IV, it will concretize and illustrate the issue further by demonstrating how some of those arguments apply to two types of Council resolutions which are regarded in this article as “legislative resolutions”: *Case-Specific “Threat to Peace”*

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12. See, e.g., *Jurisdictional Immunities of State (Ger. v. It.; Greece intervening)*, Judgment, 2012 I.C.J. 99, 143, ¶101 (Feb. 3) (“State practice from which customary international law is derived”); see also Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 JOURNAL OF CONFLICT RESOLUTION 3, 25–26 (1998); see also Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 235, 250 (2002).

13. See EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE* 79 (2014) (describing the evolutionary process of suspicion regarding IOs, which, inter alia, led to hesitancy or objection to their potential contribution to customary international law. According to Benvenisti, while the first observers of the IO phenomenon reflected on the nature and content of the norms created by these entities, those who came later sought to study their identity. It is only in the “third phase,” according to Benvenisti, that different studies have begun to thoroughly analyze the outline of international administrative law, due to the “growing realization that . . . [IOs] . . . are not necessarily ‘wonderful’ and that they ought to be controlled and limited by a law whose sources may be beyond the founding treaties of these organizations.”)

14. *Id.* at 25–69 (describing the evolution of diverse forms of global governance, inter alia, through the development of IOs).

15. Louis Henkin, *Notes from the President*, AMERICAN SOCIETY OF INTERNATIONAL LAW NEWSLETTER (Jan. 1994).

*Resolutions* which entail general rules or obligations, and *Thematic Resolutions*. Finally, in Part V, it will conclude and frame the main conditions for a potential policy-based solution for the matter.

## II. DEFINING GLOBAL LEGISLATION

The Council has an extensive history and plays a “unique role,” both structurally and substantively, within peace and security law.<sup>16</sup> In order to fulfill its mandate, the Charter authorizes it with certain competencies,<sup>17</sup> which historically have been viewed as attributed to concrete situations. The Council’s engagement in thematic resolutions, or its issuance of general rules or obligations within case-specific “threat to peace” resolutions, have ignited a debate regarding its engagement in what has been termed in the legal literature as global legislation. To discuss the Council’s functionality as such, including the authority and appropriateness of its conduct, this chapter begins by defining global legislation.

The international legal community has failed to agree upon a definition of “global legislation.” This term is so contested that certain voices object to its use—in addition to the use of terms such as “international legislation” or “lawmaking treaties”—on the basis that they suggest an inaccurate comparison to domestic legislation, thus creating the image of a “statute-substitute” in international law.<sup>18</sup> Different sources, however, offer interesting definitions of their own. According to the Merriam-Webster dictionary, for example, “International Legislation” (which is synonymous with global legislation in this context) is “the law found in the treaties and international agreements among nations binding the parties thereto but not necessarily being a part of the body of international law binding all nations.”<sup>19</sup>

Such a definition expresses the traditional State-centric approach in international lawmaking. It explicitly renders IOs, or IO organs such as the Council, unnecessary to serve as a platform for the creation of such law.

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16. See Gregory H. Fox, Kristen E. Boon & Isaac Jenkins, *The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law*, 67 AMERICAN UNIVERSITY LAW REVIEW 649, 695–97 (2018).

17. See, e.g., U.N. Charter art. 33, ¶ 2; art. 36, ¶ 1; arts. 40–41.

18. Robert Yewdall Jennings, *Recent Developments in the International Law Commission: Its Relation to the Sources of International Law*, 13 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 385, 388 (1964).

19. *International Legislation*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/international%20legislation> (last visited Jan. 11, 2022).

From an *authority* point of view, it views *States* as the only kind of entity accredited to partake in the process of global legislation. As to the *form* of global legislation, the Merriam-Webster definition relates primarily to *treaty lawmaking*. Interestingly, by not binding all nations, global legislation, according to this definition, differs from domestic legislation, which applies equally to everyone in its domestic jurisdiction under “the rule of law.”<sup>20</sup>

Another interpretation of the term “international legislation” was offered by Manley O. Hudson, Ruth E. Bacon, and Louis B. Sohn in 1931:

The term “international legislation” seems to describe, more accurately than any other, the contributions of international conferences at which states enact a law which is to govern their relations. Nor should it be limited in application to those instances in which states may make it possible for other states to accept the same law.<sup>21</sup>

Like the Merriam-Webster definition, this one relates primarily to treaty lawmaking as a representative *form* of global legislation. Such “law-making treaties,” according to the terminology of Hudson, Bacon, and Sohn, are multilateral conventions or treaties whose parties wish to lay rules of law of general application, which can be relevant to States that are not parties to those treaties as well.<sup>22</sup> Consequently, they acknowledge customary international law as an additional *form* of global legislation. Another similarity to the previous definition is the exclusive *authority* of States to globally legislate. It is clearly State-centric, in this regard, and excludes IOs from globally legislating themselves.

The above-mentioned definitions are based on a Westphalian concept that cherishes, first and foremost, States’ sovereignty. Fundamentally, they articulate States’ intentions to maintain their control of the development of

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20. See *The Four Pillars of the Rule of Law*, THE LAW DICTIONARY, <https://thelawdictionary.org/article/four-pillars-rule-of-law/> (last visited Jan. 11, 2022) [hereinafter THE LAW DICTIONARY] (according to which the four pillars of the “Rule of Law” are that the law applies to everyone; the laws are not secret or arbitrary; the laws are enforced fairly; and the justice system is fair).

21. MANLEY O. HUDSON, RUTH E. BACON & LOUIS B. SOHN, INTERNATIONAL LEGISLATION: A COLLECTION OF THE TEXTS OF MULTIPARTITE INTERNATIONAL INSTRUMENTS OF GENERAL INTEREST BEGINNING WITH THE COVENANT OF THE LEAGUE OF NATIONS, at xiii–xix (Manley O. Hudson ed., 1931) (criticizing what they deem as the frequent use of the term “international legislation,” stating that while it “is a term of some apparent novelty, it has come into such common use that it may now be employed with little hesitation”).

22. *Id.*; see also ARNOLD D. MCNAIR, THE LAW OF TREATIES, 749–50 (1961).

international law, as well as their reluctance to dilute their status as contributors to its formation.<sup>23</sup> Indeed, IOs are sparingly, if at all, granted explicit lawmaking abilities by their creators.<sup>24</sup> As Jonathan Charney points out:

State autonomy continues to serve the international system well in traditional spheres of international relations. The freedom of states to control their own destinies and policies has substantial value: it permits diversity and the choice by each state of its own social priorities. Few, if any, states favor a world government that would dictate uniform behavior for all. Consequently, many writers use the language of autonomy when they declare that international law requires the consent of the states that are governed by it.<sup>25</sup>

However, since they are perceived as having their own legal personality with distinct characteristics and rights,<sup>26</sup> are capable of performing a wide

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23. See Abbott & Snidal, *supra* note 12, at 25–26 (presenting a series of arguments to demonstrate that States are deliberate and precise when designing IOs and international agreements, because of the power IOs may hold).

24. See JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 13, 630 (2005) (explaining that IOs' lawmaking abilities have been described by commentators as involving the setting of standards and fostering of norms, but also detailing the vocal complaints regarding the "democratic deficit" that some of these IOs, such as the WTO, face due to the lack of connections at the "vertical level between national and international forms of law-making." This might serve as an explanation for the limited autonomy IOs are granted concerning lawmaking powers and the ability to operate independently.).

25. Jonathan Charney, *Universal International Law*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 529, 530 (1993); see also Stephan Hobe, *The Era of Globalization as a Challenge to International Law*, 40 DUQUESNE LAW REVIEW 655, 656–57 (2004) (speculating whether the era of globalization and the deviation from the traditional State-centric approach "marks an end to public international law").

26. IOs possess an international legal personality, have rights and obligations under international law, and may include as members—in addition to States—other non-State entities. They vary and differ in their functions, powers, goals, size, internal as well as external relationships, procedures, methods of funding, structures, and obligations. The international community, it need be mentioned, has failed to agree upon a consensual definition of "international organization," though relatively agreeable definitions are at hand. A broad one, for example, can be found in Alvarez's work. He characterizes them as "intergovernmental entities established by treaty, usually composed of permanent secretariats, plenary assemblies involving all member states, and executive organs with more limited participation." Jose E. Alvarez, *International Organizations: Then and Now*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 324 (2006); see also *Reparation for Injuries Suffered in Service of United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11) [hereinafter *Reparation*] (the Court

range of functions, and are heavily reliant on judicial decisions,<sup>27</sup> the case for considering IOs’ *authority* to globally legislate is getting stronger.<sup>28</sup> Accordingly, diverse views regarding the potential *form* of IOs’ global legislation are raised in the legal practice and literature as well.<sup>29</sup> Not in vain have scholars already suggested, for example, that there “should be nothing controversial about the notion that international organizations, alongside States, can contribute to the development of customary international law.”<sup>30</sup> This is particularly relevant to IOs or IO organs with an expanding policymaking impact,

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recognizes IOs as independent entities by expressing a post-Westphalian approach, regarding the United Nations as an “international person” that is subject to international law, possesses rights and duties, and has the capacity to bring international claims in order to maintain its rights); *see also* ALVAREZ, *supra* note 24, at 4–5.

27. *See, e.g.*, South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1966 I.C.J. 6, 291 (July 18) (Tanaka, J., dissenting) [hereinafter *South West Africa Cases*]; *see also* Michael Wood, Special Rapporteur, Second Report on Identification of Customary International Law, U.N. Doc. A/CN.4/672, at 27 n.120 (May 22, 2014) (laying additional ICJ judicial supportive opinions regarding the creation of custom by IOs); *see also* Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 474, 475 (1991).

28. *See, e.g.*, MIODRAG A. JOVANOVIĆ, THE NATURE OF INTERNATIONAL LAW 165 (2019) (“if it can be shown that there are certain acts of *non-state international institutional actors* that determine legal rights and/or obligations of norm-subjects, one can, then, justifiably speak of those institutions as international *law-making ones*” (emphasis added)); *see also* Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE JOURNAL OF INTERNATIONAL LAW 107, 116 (2012) (arguing that the creation of international law by nongovernmental organizations has become an accepted “practice”); Michael Wood, Special Rapporteur, Third Report on Identification of Customary International Law, U.N. Doc. A/CN.4/682, at 52 n.179 (Mar. 27, 2015) (providing an extensive review of the literature supporting the notion of IOs as contributors to customary international law); Stefan Talmon, *Security Council Treaty Action*, 62 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 65, 69 (2009) [hereinafter *Treaty Action*] (“While the Security Council [an IO organ] may not be able formally to abrogate or amend an *existing treaty*, it can impose binding obligations upon the member States which, in case of conflict, *will prevail over existing treaty obligations*.” (emphasis added)).

29. The ICJ, for instance, has cited General Assembly resolutions as evidence of custom several times. *See, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 162 (Dec. 19); *see also* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 103 ¶ 195 (June 27); Fox, Boon & Jenkins, *supra* note 16, at 719 (“binding Council resolutions are not mere verbiage; they are themselves actions that create new legal obligations and on occasion impose punitive measures for non-compliance”).

30. Jed Odermatt, *The Development of Customary International Law by International Organizations*, 66 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 491, 496 (2017).

such as the Council.<sup>31</sup> Moreover, the notion of IOs as creating a new law-making platform, or perhaps a new legal regime (in addition to customary international law and treaties), has been raised by scholars as well.<sup>32</sup>

Hugh Breakey also attempted to inquire into “what constitutes an act of legislation” in the international context.<sup>33</sup> While in the domestic context “the answer is clear enough,” he argues that the international realm poses challenges.<sup>34</sup>

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31. See, e.g., ALVAREZ, *supra* note 24, at 32–39 (claiming that various studies indicate that such aspirational IOs have obtained power and influence beyond their creators’ anticipations).

32. See, e.g., Monica Hakimi, *The Jus ad Bellum’s Regulatory Form*, 112 AMERICAN JOURNAL OF INTERNATIONAL LAW 151, 155 (2018) (Interestingly, Hakimi has offered the application of a new form of law called “informal regulation.” This form, which is relevant to the *jus ad bellum* regime in particular, “shapes how the law is defined or applies in concrete settings.” Through relatively procedural and particularistic actions taken by the Council—like a press release—rather than substantive or generalizable ones, Hakimi claims it can procure approval for particular operations “that go beyond what the standards permit.” This form of law can therefore trade on the Council’s authority in the long run.); see also Charney, *supra* note 25 (describing the establishment of another lawmaking platform, in addition to the two primary ones, which are not sufficient, in his view, for the establishment of “universal international law”).

33. Hugh Breakey, *Parsing Security Council Resolutions: A Five-Dimensional Taxonomy of Normative Properties*, in THE SECURITY COUNCIL AS GLOBAL LEGISLATOR, *supra* note 10, at 51.

34. *Id.* (Explaining that legitimate domestic legislation is easy to identify: “A duly authorized representative body creates black letter law laying down general obligations binding on the entire population under its jurisdiction. Thereafter, a domestic system of courts and state security services ensure, to a considerable extent at least, the enforcement of these general laws.”); see also Fraser, *supra* note 10, at 297 (explaining that further driving the controversy over the legislative capacity of the Council is the inherent difficulty of categorizing the UN’s organs—which are characterized by “constitutional messiness”—into the domestic tripartite constitutional division of executive, legislative, and judiciary, in a way that might help identify the Council as a straightforward “legislator”); JOVANOVIĆ, *supra* note 28, at 163 (“the UN *does not provide for an institutional structure comparable to the municipal law*—that of a single global legislative body, a global executive branch, and a global court of the last instance” (emphasis added)); cf. Michael W. Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of their Application*, 3 TRANSNATIONAL DISPUTE MANAGEMENT 1 (2005) (“The commonplace conception of law-making in domestic political systems—the enactment of ‘legislation’ by highly specialized and routinized political institutions—is *inappropriate for inquiry about law-making in the much more complex and varied international political system*” (emphasis added)). But see SIMON CHESTERMAN ET AL., LAW AND PRACTICE OF THE UNITED NATIONS—DOCUMENTS AND COMMENTARY, at xxxiii (2d ed. 2016) (discussing the UN Charter as a constitution which may contain the following constitutional elements: tendency toward perpetuity; allocation of functions to governing

International law is not crafted by legislatures, in the sense of a representative group authorized to impose general laws on every State. On the contrary, international law is created by the voluntary self-imposition of duties by States through the mechanism of the treaty or by the gradual development of standards of proper conduct through longstanding custom.<sup>35</sup>

Unlike the previous definitions, Breakey does not offer a working definition of global legislation, but rather proposes a six-dimensional taxonomy to identify it. This taxonomy includes narrow binding-ness (with a distinction between “hard” and “soft” law); determinacy; external authority; generality; novelty; and the mode by which the duties acquire their legal force.<sup>36</sup> From an *authority* perspective, Breakey diverges from the Westphalian concept, determining that IOs, alongside States, can partake in global legislation. As to the *form* of such global legislation, Breakey does not go into detail. As his study focuses on the UN Security Council, he relates to resolutions only, while other types of IO conduct, such as statements or recommendations, are not addressed. All in all, Breakey’s approach to identifying global legislation is ad hoc. As such, it might not provide as much clarity as the previous definitions but may leave room for flexibility in a constantly developing world.

Like Breakey, Paul Szasz does not take a State-centric approach to global legislation; does not offer a comprehensive, coherent definition of global legislation; and focuses on the UN Security Council.<sup>37</sup> However, one may draw general insights regarding IOs and global legislation from his work. First, from an *authority* perspective, Szasz favors the possibility that IOs in general—the Council in particular—be authorized to legislate international law alongside States, under certain conditions. Indeed, Szasz acknowledges

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bodies; indelibility and primacy); see also Anthony F. Lang, Jr., *Constitutionalism and the Law Evaluating the Security Council*, in THE SECURITY COUNCIL AS GLOBAL LEGISLATOR, *supra* note 10, at 35 (Analyzing the UN Charter as a constitutional text which posits a global constitutional order. Evaluating three relevant constitutional criteria for legislative legitimacy—the Kantian perspective on the authority of constitutions; the constitutional requirements for separation of powers; and the constitutional requirements for constituent power—Lang claims that the Council could live up to just some of those standards, in a way that reflects a “positive potential,” yet also “political dilemmas.”).

35. Breakey, *supra* note 33, at 51.

36. *Id.* (emphasizing that for the taxonomy to apply more broadly to IOs, other than the Council, the sixth dimension—the mode by which the duties acquire their legal force—must be added).

37. Paul C. Szasz, *The Security Council Starts Legislating*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 901 (2002).

the long-accepted presumption according to which IOs, at most, “could create ‘soft law,’ which might gradually harden into customary law or be codified into binding treaties.”<sup>38</sup> However, as the traditional State-centric process of creating international law has failed to address pressing and urgent matters, he claims that adding a “legislative capacity” would positively enhance the repertory of devices available to the Council under Chapter VII.<sup>39</sup> Such a presumption, one may claim, can be applied towards other IOs, or IO organs like the Council, which are heavily invested in the standardization of norms in a given field. It need be noted that according to Szasz’s theory, the ability to legislate by an IO is limited in scope and is confined to its designated area of practice.<sup>40</sup>

Szasz’s work also suggests an interesting perspective regarding the *form* of global legislation. As his discussion elaborates on the specific case of the Council, he intuitively points to its resolutions as the manifestation of such legislation. As to the characteristics of such resolutions, Szasz leaves the reader with implied general guidelines only. For example, although Council resolutions do not have to present a consensus, Szasz suggests that when legislating, “the Council would also do so only to the extent that it reflects the general will of the world community, as expressed by the General Assembly.”<sup>41</sup> The methods for identifying such a “general will” within the Council’s resolutions are not detailed and remain unclear. Moreover, there is no suggestion to distinguish between different types of Council resolutions (case-specific “threat to peace” or thematic), and no guidance for identifying a “general will” within the resolutions or decisions of other IOs or IO organs than the Council, which may potentially be considered as global legislators as well.

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38. *Id.* at 901 (Mentioning that the traditional State-centric approach is that “‘hard,’ or binding, international law could be created only by states, whether through the adoption and ratification of treaties, the creation of customary law by means of general practice supported by *opinio juris*, or the recognition of general principles of law.” IOs, according to this school of thought, could generally adopt recommendations to their members, but only a few “are empowered to adopt international legal rules that could become binding on their members, but these states could opt out by raising a timely objection.”).

39. *Id.* at 904 (“The addition of a legislative capacity would appear to be another such enhancement, the bounds of which it may be worth exploring, at least tentatively”).

40. *Id.* (“The basic legal limitation on the legislative capacity of the Security Council is evidently that its exercise must relate to the maintenance of international peace and security”).

41. *Id.* at 905.

Like Szasz and Breakey, Allen Buchanan offers an interesting viewpoint regarding “international law-making” (which is also synonymous with global legislation in this context) from both *authority* and *form* perspectives.<sup>42</sup> From an *authority* perspective, Buchanan acknowledges the possibility that IOs or “global governance institutions” may be authorized to legislate international law, alongside States. Such institutions, according to his view, “are increasingly taking on law-making functions.”<sup>43</sup> While differentiating between the three main types of international law-making institutions, Buchanan mentions the following:

[T]he institution of *treaty-making*, the institution of *customary international law*, and *global governance institutions*, which includes a diversity of entities such as the World Trade Organization (WTO), the United Nations (UN) Security Council, environmental regimes such as that established by the Kyoto Accords, and various judicial and regulatory ‘government networks’ composed of officials from several states.<sup>44</sup>

The abovementioned identities of global governance institutions may suggest an inexhaustive list of IOs that are *authorized* to globally legislate. Consequently, it might reveal Buchanan’s perspective regarding the *form* and manifestation of global legislation as well. Such a general definition, however, does not provide clear guidelines on how to identify global legislation, nor does it detail exactly what counts as an act of law-making by global governance institutions. Rather, Buchanan focuses on the legitimacy of institutions, systems, or regimes that create international law. As such, he inquires whether certain international law-making institutions have a “right to rule” and what standards of legitimacy they should meet.<sup>45</sup> Nevertheless, Buchanan mentions that even “legitimate institutions may sometimes produce illegitimate laws.”<sup>46</sup> In the Council’s context, for example, he does not specify resolutions that could meet this legitimacy criterion, nor distinguish between thematic resolutions and general rules or obligations within case-specific “threat to peace” resolutions. Such a position could leave the reader,

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42. Allen Buchanan, *Legitimacy of International Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 79, 80 (Samantha Besson & John Tasioulas eds., 2010).

43. *Id.*

44. *Id.* (emphasis added).

45. *Id.* at 79–80 (“*institutional legitimacy* is primary in so far as the legitimacy of particular laws or of a corpus of law depends on the legitimacy of the institutions that make, interpret, and apply the laws” (emphasis added)).

46. *Id.* at 80; cf. Lang, *supra* note 34, and its accompanying text.

again, with implied general guidelines only, while depending on a contested term such as “legitimacy.”

What emerges from all the above definitions of global legislation is, first and foremost, an inconsistency regarding the content of this vague term. Does global legislation involve treaty lawmaking and customary international law only, or perhaps also resolutions made by relevant IOs, under unclear circumstances and conditions? Any attempt to clarify the subjects of these various definitions—meaning *who* can globally legislate—gives rise to even more inconsistencies. Some interpretations exclude IOs from being able to function as global legislators, as they are regularly confined to the laws produced by States. More flexible interpretations, on the other hand, combined with timely recognition of IOs’ influence within the international law realm, might suggest otherwise.<sup>47</sup>

These inconsistencies further aggravate the Council-related debate on the matter. This discussion has never been more salient, however, as the potential for the Council’s conduct to “override, modify, or extend the scope of existing international law is immense, especially as it establishes rules of a general nature, addressed to all states, often for an indefinite period. It therefore becomes critically important to understand the potential legal limits of such action.”<sup>48</sup> The next chapter addresses this issue, inquiring whether the Council can and should be considered a global legislator.

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47. *See, e.g.*, WOLFGANG G. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 139 (1964) (Addressing this gradually increasing influence of IOs on international law and stating that IOs’ ability to formulate binding rules is occasionally extended to include declared legal principles, which are ultimately adopted by States. Although Friedman does not explicitly define IOs as global legislators, a liberal interpretation of his view may suggest just that. Szasz’s standpoint, as mentioned above, might be the expression of such a presumption.); *see also supra* text accompanying notes 29–30.

48. 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*, *supra* note 10, at 71, 74; *see also* Alan Boyle, *UN Security Council Lawmaking? Towards a New Role for the Security Council*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* 179 (A. Cassese ed., 2012) (Emphasizing the Council’s vast impact and, as a result, the need to consider the meaning of its conduct: “Unlike any other international organization, it gives the Security Council the power to rewrite or dispense with existing international law in particular situations. Potentially, Security . . . Council resolutions may thus have as great or greater significance than the concept of *jus cogens*.”).

### III. THE SECURITY COUNCIL AS A GLOBAL LEGISLATOR

Whether the Council has global legislative powers under Chapter VII may be the latest in a long line of debates regarding the scope of its authorities.<sup>49</sup> The lack of a consensus regarding a definition of global legislation and IOs’ authority to partake in it leads to disorientation within the Council-related discussions on the matter.<sup>50</sup> Attempting to summarize the general distinction among legal scholars regarding the Council’s engagement in legislation, Monika Heupel stated:

In the academic literature, Security Council legislation has been conceived of in different ways. Some scholars, using a *broad definition*, conceive of legislation as imposing legally binding obligations upon states that compel them to change their domestic legislation, *either with regard to a specific threat to international peace and security (which no longer necessarily emanates from a state actor) or with regard to a generic threat*. Others, using a *narrow definition*, conceive of legislation as imposing legally binding obligations upon states that compel them to change their domestic legislation only to counteract a *generic threat*, hence to enact general domestic law.<sup>51</sup>

While this description may apply to some literary work,<sup>52</sup> it does not necessarily reflect the common tendency of writings regarding the Council’s engagement in global legislation. Some argue either in favor of or against the

49. See, e.g., Rosand, *supra* note 5, at 552; see also JOVANOVIĆ, *supra* note 28, at 168 (“The most obvious candidate for the status of non-state international institution of law-making is the UN Security Council”).

50. See, e.g., Wouters & Odermatt, *supra* note 48, at 74.

51. Monika Heupel, *Security Council Legislation in Countering Terrorism*, in THE SECURITY COUNCIL AS GLOBAL LEGISLATOR, *supra* note 10, at 124 (emphasis added).

52. Compare broad interpretations, e.g., Isobel Roele, *Subsidiarity In Global Governance: Sidelining Subsidiarity: United Nations Security Council “Legislation” and its Infra-Law*, 79 LAW AND CONTEMPORARY PROBLEMS 189 (2016) (discussing Security Council Resolutions 1373 and 1540, and their provisions obligating States to amend their domestic laws); and Fionnuala Ní Aoláin, *The Massive Perils of the Latest U.N. Resolution on Terrorism*, JUST SECURITY (July 8, 2019), <https://www.justsecurity.org/64840/the-massive-perils-of-the-latest-u-n-resolution-on-terrorism/>; and Keith Harper, *Does the United Nations Security Council Have the Competence to Act as Court and Legislature?*, 27 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 103 (1994); and Rosand, *supra* note 5, at 542–90; with narrower interpretations, e.g., Stefan Talmon, *The Security Council as World Legislature*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 175 (2005); and Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 275 (2008).

Council's function as a global legislator, but without portraying the amendment of domestic law by States as a necessary condition for the manifestation of legislation. As a matter of fact, they frequently discuss the Council as a global legislator without initially offering a working definition of the term or agreeing (or compromising) on a specific interpretation of it. Some prefer to use the term "legislative authority," inquiring whether the Council has obtained it, and *then* conclude their stand regarding its alleged status as a global legislator. A widely accepted definition of "legislative authority," in this regard, was offered by Edward Yemin, who argued that "legislative acts have three essential characteristics: they are unilateral in form, they create or modify some element of a legal norm, and the legal norm in question is general in nature, that is, directed to indeterminate addressees and capable of repeated application in time."<sup>53</sup>

As will be demonstrated, after initially identifying these characteristics within a given Council resolution, scholars often deem the Council to be engaging in global legislation. In order to coherently correspond with the below-mentioned scholarly views on the matter, this article will use Yemin's rationale as well to determine a working definition of global legislation as the issuance of binding resolutions or general rules that apply to all States at all times and are not associated with any concrete situation.

This working definition will be used hereinafter to examine the Council's functionality as a global legislator, as expressed through two types of arguments which arise in the extended corpus of writings on the matter. The first concerns the *authority* of the Council to engage in global legislation under the UN Charter, while the second mostly engages in normative and policy reasoning regarding the *appropriateness* of the Council's function as a global legislator.

#### A. Authority to Engage in Legislation Under the UN Charter

Is the Council authorized to issue binding resolutions or general rules or obligations that apply to all States at all times, not necessarily in association

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53. EDWARD YEMIN, LEGISLATIVE POWERS IN THE UNITED NATIONS AND SPECIALIZED AGENCIES 6 (1969) (emphasis added) (It is worth noting that Yemin's definition differs from Heupel's, which requires States to *change their domestic laws as a necessary condition* for the manifestation of "legislation" by the Council. Heupel's description, in this regard, might exclude other Council resolutions which have legislative characteristics according to Yemin. Among them are Council-imposed obligations on States to change certain policies; trespassing or signing into relevant treaties. Such acts may be unilateral in form as well as create or modify some element of a legal norm which will be general in nature yet won't necessarily obligate States to change their domestic laws, at least not directly.).

with a concrete situation? Based on Edward Yemin’s definition of “legislative authority,” Happold concluded that the Council’s Chapter VII-based resolutions cannot amount to legislation,<sup>54</sup> and therefore it cannot be counted as a global legislator. Legislative work, he stresses, “involves the promulgation of abstract legal propositions,” which are not necessarily associated with concrete situations. On the contrary, the Council, he argues, is authorized to issue its decisions in response to concrete instances only.<sup>55</sup> Issuing resolutions not in response to concrete situations is therefore not part of the Council’s mandate. Even though some of the Council’s resolutions may have precedential value, their normative value does not amount to legislation, simply because they do not apply to all States at all times.<sup>56</sup>

Similarly adhering to the strict letter of the Charter when assessing the Council’s authority, Hans Kelsen argued in 1951 that the Council’s purpose is to “preserve peace, not to enforce the law.”<sup>57</sup> Sir Derek William Bowett accordingly stated, four decades later:

Not even the General Assembly is a “legislature” and the Council certainly is not. The obligations of Member States stem from the UN Charter, and the role of the Security Council is *not to create or impose new obligations having no basis in the Charter*, but rather to identify the conduct required of a Member State because of its preexisting Charter obligations. Thus, the Council does not “legislate”: it enforces Charter obligations.<sup>58</sup>

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54. See Happold, *supra* note 6, at 597–98.

55. *Id.*; see also Olivia Bosch, *A Legislative Evolution: Security Council Resolution 1540 Revisited*, in THE SECURITY COUNCIL AS GLOBAL LEGISLATOR, *supra* note 10, at 97 (Noting that nations and scholars alike have complained that the Council is only authorized to handle concrete situations, not to act as a “dictator,” and has therefore overstepped its authority in enacting Resolutions 1373 and 1540.) For broader discussion regarding these resolutions see *infra* Part IV(B).

56. See Happold, *supra* note 6, at 597–98 (explaining that a particular norm can be genuinely general in nature only if it is applicable to all persons and circumstances or in all situations where particular criteria have been satisfied); cf. Rossana Deplano, *The Use of International Law by the United Nations Security Council: An Empirical Framework for Analysis*, 29 EMORY INTERNATIONAL LAW REVIEW 2085, 2089 (2015) (“since individual resolutions of the Security Council do not set a precedent, what constitutes a threat to or breach of international peace and security is ultimately determined by the willingness of individual permanent members to take a specific action or inaction on a case-by-case basis”).

57. HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 249 (1951).

58. Derek William Bowett, *Judicial and Political Functions of the Security Council and the International Court of Justice*, in THE CHANGING CONSTITUTION OF THE UNITED NATIONS 79, 79–80 (H. Fox ed., 1997) (emphasis added).

A standpoint comparable to Bowett's was expressed at much the same time by Sir Michael Wood. Although acknowledging the expansion of the Council's powers and the immense influence it has, Wood refused to refer to it as a "legislator," simply because it is not authorized to promulgate new rules of general application. In his words,

[I]t is misleading to suggest that the Council acts as a legislature, as opposed to imposing obligations on states in connection with *particular situations or disputes*. In acting under Chapter VII . . . [i]t may impose obligations . . . , it may reaffirm existing rules, it may apply existing rules, it may depart from or override existing rules in *particular cases*, but it does not lay down new rules of *general application*.<sup>59</sup>

The views expressed by Happold, Bowett, and Wood regarding the Council's strict mandate under the Charter are supported by statements made by practitioners as well. Certain of these practitioners have suggested that the Council is not authorized to issue resolutions of general rules that will hold a precedential value and thus obligate all UN members.<sup>60</sup> Filling gaps within international law, according to this school of thought, is a role to be handled by the UN General Assembly through negotiation and the conclusion of treaties.<sup>61</sup>

On the abovementioned views, the Council was never granted an explicit legislative authority under the Charter to issue resolutions that embody new rules of general application that are not in response to concrete situations. It

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59. Michael C. Wood, *The Interpretation of Security Council Resolutions*, in MAX PLANK YEARBOOK OF UNITED NATIONS LAW 73, 77–78 (Jochen A. Frowein & Rudiger Wolfrum eds., 1998) (emphasis added).

60. Statement by Li Zhaoxing, Representative of China, to the U.N. Security Council, Provisional Verbatim Record of the 3217th Meeting of the Security Council, U.N. Doc. S/PV.3217, at 33 (1993) (expressing concern that establishing an international tribunal through a UN Security Council resolution may hold precedential value, as all UN members will have to implement it in order to fulfill their obligation under the Charter).

61. *Compare* U.N. Charter art. 13, ¶ 1 ("The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification"); *with* Statement by Ronaldo Mota Sardenberg, Permanent Representative of Brazil, to the U.N. Security Council, Provisional Verbatim Record of the 3217th Meeting of the Security Council, U.N. Doc. S/PV.3217, at 34 (1993) (mentioning that it would be most appropriate to establish an international tribunal, for example, through negotiating a multilateral treaty in a more representative body such as the UN General Assembly).

therefore cannot be counted or function as a global legislator. Expanding the Council’s authorities to unlisted capacities in the Charter could weaken the constitutional integrity of the Charter, says Gaetano Arrangio-Ruiz,<sup>62</sup> because the attribution of legislative authorities to an IO organ such as the Council is contrary to the operating principle of international law, which is States’ general consent to the creation of rules of general application.<sup>63</sup> Consequently, one may claim that any Council conduct that appears to be “legislation” should be viewed as *ultra vires*.<sup>64</sup>

Alternative views, however, claim that the Council did obtain legislative authority under the Charter, as it is authorized “to alter the international legal landscape instantaneously.”<sup>65</sup> As such, it is presumably capable of setting binding resolutions or general rules that apply to all States at all times.

The legal basis for such a statement was laid already in 1992, when the International Court of Justice (ICJ) ruled that the obligation of member States to the resolutions of the Council could suppress obligations they have towards existing treaties.<sup>66</sup> Such a view is based on a constitutional reading of the Charter—both Article 103 (which posits member States’ obligation to the Charter as superior to other treaties), and Article 25 (which obligates member States to carry out the Council’s decisions). Keith Harper raised the thought only two years after the ICJ’s statement:

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62. Gaetano Arrangio-Ruiz, *On the Security Council’s “Law-Making”*, 83 RIVISTA DI DIRITTO INTERNAZIONALE 609, 630, 700 (2000).

63. See Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 235, 250 (2002).

64. See Rosand, *supra* note 5, at 545 (adducing the possible view according to which “[u]nder the traditional international law regime, rules of law are binding on States only when they have consented to be bound either through the negotiation and conclusion of a treaty or development of customary international law, which consists of State practice and *opinio juris*”); it shall be noted, however, that it might be difficult to adhere to the *ultra vires* presumption, as States generally acquiesce to such resolutions.

65. S. R. Ratner, *The Security Council and International Law*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21<sup>ST</sup> CENTURY* 592 (David Malone ed., 2004); *but cf.* Lang, *supra* note 34, and its accompanying text.

66. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Provisional Measures, Order, 1992 I.C.J. 3, ¶ 37 (Apr. 14) [hereinafter *Lockerbie*]; see also Vera Gowlland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in Light of the Lockerbie Case*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 643 (1994).

Under Chapter VII, the Security Council is given the authority to determine what constitutes a “threat to the peace.” However, if the Council determines that a particular state action, though not a violation of international law, is nonetheless a threat to international peace, *is it not in effect creating legal obligations for that state, in light of the Charter’s requirements that member states obey Security Council determinations?*<sup>67</sup>

A year later, Frederic Kirgis, who also adhered to Yemin’s definition of legislative authority, came to the opposite conclusion of Happold’s, stating that Articles 41 and 42 of the UN Charter, buttressed by Articles 25 and 48, “clearly authorize the Security Council to take legislative action.”<sup>68</sup> The Council’s resolutions thus amount to global legislation, as they are

*unilateral in form* (adopted by the fifteen-member Security Council rather than by agreement of all UN members); they have *created or modified legal norms* (binding rules); and they have been *general in nature* (directed to all member states and sometimes even to nonmember, although Article 48(1) permits them to be directed more selectively).<sup>69</sup>

Accordingly, Alvarez claimed that a rigid interpretation of the Charter’s text might be outdated, as the Council has already entered its “legislative phase.”<sup>70</sup>

The discussion regarding the Council’s *authority* to engage in global legislation, based on the definition of legislative authority, is far from conclusive. Moreover, it does not provide a broad enough ground from which to conclude the motives and concerns of those either in favor of or against the Council’s function as a global legislator. The majority of the discourse concerning the Council’s global legislation, however, takes place in the arena which evaluates the *appropriateness* of such conduct. As it is substantially based

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67. Harper, *supra* note 52, at 127 n.101 (“Article 25 of the U.N. Charter provides that ‘the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter . . . . If, for instance, the Council determines that a particular state action (e.g., cutting down certain rain forests) is a *per se* ‘threat to the peace,’ then that state action would be legally proscribed. In this way, the Council can act as a legislature.”) (emphasis added).

68. Frederic Kirgis, *The Security Council’s First Fifty Years*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW 506, 520 (1995) (it should be noted, however, that Happold’s analysis was later than Kirgis’s).

69. *Id.* (emphasis added).

70. Jose Alvarez, *Hegemonic International Law Revisited*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 874 (2003) [hereinafter *Hegemonic*]; cf. Talmon, *supra* note 52, at 175.

on normative grounds, identifying the motives behind the different standpoints in this realm is relatively easier. Understanding them, as mentioned above, may not only underscore the controversies on the matter, but may also help in constructing an appropriate policy-based suggestion to address them in the future.

*B. Appropriateness in Functioning as a Global Legislator*

A second type of argument in the relevant literature is normative and concerns the appropriateness of the Council’s function as a global legislator. It should be stressed, in this regard, that objectors to a global legislative capacity of the Council on normative grounds do not necessarily deny its legislative authority according to the Charter, but rather object to its implications, and therefore normatively claim that such authority should be denied to the Council.

First, objectors cite the Council’s characteristics, pointing to it as an unbalanced, selective, unrepresentative, and politicized IO organ, which is controlled by the powerful Permanent Five (P5).<sup>71</sup> Considering relevant incidents, they may even raise doubts regarding its status as the trustee of the collective security doctrine.<sup>72</sup> Unilateral attempts by the Council to legislate

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71. Compare ALVAREZ, *supra* note 24, at 70–71, 101 (Stating that in order to secure “effective collective security,” the Charter drafters violated the equality between States mentioned in Articles 1 and 2 of the Charter; Alvarez also mentions that the politicization and conduct of the Council, just like any other UN organ, is barely scrutinized by the ICJ.); with Statement by Orlando Requeijo Gual, Representative of Cuba, to the U.N. Security Council, Provisional Verbatim Record of the of the 4950th Meeting of the Security Council, U.N. Doc. S/PV.4950, at 30 (Apr. 22, 2004); and Statement by Dumisani Kumalo, Representative of South Africa, *in id.* at 21; Martti Koskenniemi, *The Police in the Temple Order, Justice and the UN: A Dialectical View*, 6 EUROPEAN JOURNAL OF INTERNATIONAL LAW 325 (1995) (arguing that in light of the P5’s dominant role, the Council’s procedures and “lack of delimited competence,” and absent a “legal culture,” it is hard to “justify enthusiasm about [the Council’s] increased role in world affairs”); and Deplano, *supra* note 56, at 2095–97 (noting the Council’s bias and presenting statistics, according to which 66% of all Security Council decisions adopted between 2004 and 2013 specifically target Africa and the Middle East, and 85% of the entirety of its geo-political decisions are focused on that area); and Szasz, *supra* note 37, at 905 (discussing the politicization of the Council’s conduct); and Buchanan, *supra* note 42, at 85 (“it is frequently said that particular ILLs, like the UN Security Council . . . or even the entire international legal order, are unfairly controlled by a handful of powerful states, thereby unfairly disadvantaging weaker ones”).

72. A key example illustrating the dilution of the Council’s status as a trustee of the collective security doctrine is the joint attack of the U.S., UK, and France in Syria in April

would therefore be “destructive of the international legal order,” according to Happold.<sup>73</sup> Together with the Council’s veto power, he adds, they may usurp the power of the General Assembly—which is a more representative body, though it is not equivalent in its powers to the Council—as well as States’ autonomy to legislate within matters of their own jurisdiction. In his words,

it might well be that the very subjects on which the General Assembly wished to legislate would be those that the permanent members of the Security Council would wish to veto. *Absent . . . safeguards*, the adoption by the Security Council of the power to legislate for UN member states can only be seen as a usurpation of those states’ powers to legislate for themselves.<sup>74</sup>

The application of general norms to specific instances, as the Council attempts to do, Happold adds, is the duty of the judiciary. Thus, the UN is

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2018. Although the Council is entrusted, according to Article 39 of the Charter, with maintaining world peace and security, no *ex-ante* reference was made to it by the attacking States. Scholars attributed this phenomenon to the rise in recent years of the self-defense doctrine, anchored in Article 51 of the Charter. *See, e.g.*, Michael Wood, *International Law and the Use of Force: What Happens in Practice?* 53 INDIAN JOURNAL OF INTERNATIONAL LAW 345 (2012). Adding to the phenomenon are States’ tendencies to lean towards a more frequent use of the anticipatory and preventive self-defense doctrines. *See, e.g.*, GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 17, 2002); *cf.*, JENNIFER TRAHAN, EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES 260–342 (2020) (Exemplifying how the use or threat to use the veto power in situations such as crimes in Syria and Darfur, ultimately blocked Council resolutions aimed at halting crimes against humanity, genocide, or war crimes (defined in her work as “atrocious crimes”) and was “used in a way that countenances or facilitates the ongoing commission of atrocious crimes.” It is important to note, however, that Trahan’s position is pragmatic and attempts to make the Council operate more effectively.).

73. Happold, *supra* note 6, at 593. Based on those justified concerns, some have argued that “very far-reaching powers” of the Council should be conditioned to short-term measures only. *See, e.g.*, Nico Krisch, *Introduction to Chapter VII: The General Framework*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1239, 1243 (Bruno Simma et al. eds., 3d ed. 2012).

74. Happold, *supra* note 6, at 609 (emphasis added); *Cf.* Bill Bowring, *The Degradation of International Law?*, in LAW AFTER GROUND ZERO 3, 16–17 (John Strawson ed., 2002) (emphasis added).

at risk of coming to resemble a “police state” rather than a system based on the rule of law.<sup>75</sup> Arrangio-Ruiz similarly has implied:

We refer to that fundamental legal characterization of Chapter VII measures as peace-enforcement measures rather than law-enforcing, law-making or law-determining measures . . . *otherwise anything could be validly decided by the Council by simply evoking Chapter VII*: it would be too easy, that way, to attain the “paradise” of a fully-fledged (although hardly lawful) world order and world government.<sup>76</sup>

A second line of arguments objecting to the implications of the Council’s legislative authority—hence to its function as a global legislator—claims that attributing such status is problematic due to the Charter’s phrasing. The Council allegedly is constrained to act in accordance with the “Principles and Purposes of the United Nations,”<sup>77</sup> primarily listed in Articles 1 and 2 of the Charter. These include, *inter alia*, the promotion of and respect for human rights, the development of friendly relations among nations, and respect for the sovereign equality of all States.<sup>78</sup> Two principles, on the contrary, do not apply to the Council when acting under Chapter VII. The first is the principle that prevents the UN from intervening in the “domestic jurisdiction of any State.”<sup>79</sup> The second, which is anchored in Article 1(1) of the Charter, is the need to act “in conformity with the principles of justice and international law.”<sup>80</sup> A close reading of Article 1(1), according to such views, reveals that it only applies to the Council’s activities under Chapter VI. Consequently, the measures the Council may impose in order to counter threats to peace and security under Chapter VII need not be consistent with existing international law, putting in question the appropriateness of attributing global legislative abilities to an IO organ that is allegedly not confined to international law when acting under Chapter VII.<sup>81</sup>

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75. See Serge Sur, Research Paper, Security Council Resolution 687 of 3 April 1991 in the Gulf Affair: Problems of Restoring and Safeguarding Peace, U.N. Doc. UNIDIR/92/53, at 8, 61 (1992); see also Jose E. Alvarez, *Nuremberg Revisited: The Tadic Case*, 7 EUROPEAN JOURNAL OF INTERNATIONAL LAW 245, 249 (1996).

76. Arrangio-Ruiz, *supra* note 62, at 724 (emphasis added).

77. U.N. Charter art. 24, ¶ 2.

78. *Id.* arts. 1–2.

79. *Id.* art. 2, ¶ 7.

80. *Id.* art. 1, ¶ 7.

81. See Rosand, *supra* note 5, at 556.

A third normative argument that points to the inappropriateness of the Council's obtaining legislative authority relates to the precedential value of its resolutions. On this view, by treating human rights as part of the definition of "international peace and security" and addressing situations that traditionally would have fallen outside its mandate according to the Charter, the Council is constantly exceeding its mandate in instances where a threat to international peace has not necessarily occurred.<sup>82</sup> It thereby repeatedly lowers the bar for applying certain Chapter VII-based enforcement measures in a precedential manner.<sup>83</sup> Alvarez accordingly critically addresses the implications of this phenomenon:

[N]o other existing international mechanism pairs *global legislative power* capable of departing from preexisting treaty obligations with the possibility of enforcement via binding economic sanctions or military force. Further, all other examples of *global legislative power* in modern international organization entail *much more narrowly defined lawmaking*, as opposed to lawmaking triggered by *undefined "threats" to international peace*. Indeed, many have suggested that the power of the Council to define for itself what constitutes such *vague threats* is what makes its discretion impervious to judicial review.<sup>84</sup>

Related instances are the UN authorizations to assist in election monitoring and verification, a key example being Resolution 940, which resulted

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82. Compare S.C. Res. 2482 (July 19, 2019) ("any measures taken to counter-terrorism must comply with [State] obligations under international law, international human rights law"); with Fionnuala Ní Aoláin, *A Post-Mortem on UN Security Council Resolution 2482 on Organized Crime and Counter-Terrorism*, JUST SECURITY (Aug. 12, 2019), <https://www.justsecurity.org/65777/a-post-mortem-on-un-security-council-resolution-2482-on-organized-crime-and-counter-terrorism/> (mentioning that this integration of human rights is done narrowly and silently, as part of "a sustained marginalization of meaningful human rights integration in the nuts and bolts of Security Council work in the counter-terrorism arena"); and Ní Aoláin, *supra* note 52 (noting that the broadening of the "threat to international peace and security" concept includes "situations of non-international armed conflict, gross violations of human rights amounting to crimes against humanity, humanitarian crises, coups d'état, or other serious threats to the democratic order of a state").

83. ALVAREZ, *supra* note 24, at 194 (emphasis added); see also JOVANOVIĆ, *supra* note 28, at 170 n.74 (discussing the Council's "wide discretion in characterizing certain events and situations as threats to international peace and security" and Resolution 2177 as a "notable example" for this conduct, in which the Council determined the Ebola outbreak in Africa constituted a threat to international peace and security).

84. See *Hegemonic*, *supra* note 70, at 874 n.9; cf. Rosand, *supra* note 5, at 559.

from the 1991 coup against Jean-Bertrand Aristide in Haiti.<sup>85</sup> Although its second paragraph allegedly attempted to squelch any notion of precedential value by recognizing the “unique” and “extraordinary nature” of the circumstances, as well as the “exceptional response” needed, reality took a different course.<sup>86</sup> “Once the Council has crossed a line once,” Alvarez notes, “it is easier for it to cross it again.”<sup>87</sup> According to his explanation, since the Council is acting under a presumption of legality, States tend to interpret its actions accordingly.<sup>88</sup> Until the Council’s legitimacy is exhausted, he suggests, such resolutions will continue to enjoy the presumption of adherence to general principles of the law, and will be read as legal precedents for the Council and States alike.<sup>89</sup>

A related argument is concerned with such overreach not only because of its implications on State sovereignty, but also on human rights. Fionnuala Ní Aoláin, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, has heavily criticized this phenomenon. Discussing the Council’s assertive “overtake” of terrorism regulations following September 11—as a result of the abovementioned broadening of the “international threat to peace and security” concept—she argues that the Council establishes “far-reaching legislative obligations” on all UN member States.<sup>90</sup> For example, regarding Resolution 2462 as yet another indication of the Council’s broadening of the “threat to international peace and security” concept, Ní Aoláin does not deny its legislative nature, but rather points to its problematic normative implications.<sup>91</sup> “The legislative aspects of that resolution,” she claims, “mandated extensive financial regulation for the undefined crimes of terrorism financing

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85. S.C. Res. 940, ¶ 10 (July 31, 1994).

86. *Id.* ¶ 2.

87. See ALVAREZ, *supra* note 24, at 185–98; see also Mahnouch H. Arsanjani, *Reviewed Work: International Organizations as Law-Makers* by Jose E. Alvarez, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 735–36 (2006) (book review) (discussing other representative examples of the linkage between human rights violations and the “threat to international peace and security” concept, among them S.C. Res. 688 (Apr. 5, 1991) regarding the Council’s invocation of human rights concerning the oppression of the Kurdish and Shiite minorities in Iraq; S.C. Res. 824 (May 6, 1993) and S.C. Res. 981 (Mar. 31, 1995) regarding the “ethnic cleansing” in Bosnia-Herzegovina by Croatia; and S.C. Res. 929 (June 22, 1994) regarding the genocide in Rwanda).

88. See Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations*, 59 AMERICAN JOURNAL OF INTERNATIONAL LAW 168 (1963).

89. See ALVAREZ, *supra* note 24, at 194–95.

90. See Ní Aoláin, *supra* note 52.

91. S.C. Res. 2462 (Mar. 28, 2019).

and support, and expanded the definition of material support to terrorism.”<sup>92</sup> Such action by the Council, she argues, “undermines the traditional basis of consent for international lawmaking, undercuts the protection of human rights, creates an unequal exercise and burden of power between States on the Security Council and those that are not, and chips away at the sovereignty of States that do not sit on the Council.”<sup>93</sup>

The abovementioned standpoints may reflect a common concern regarding the Council’s obtaining of legislative authority, as it perpetuates powerful States’ hegemony over weaker ones, and perhaps also encroaches on human rights. Alvarez has critically addressed this phenomenon as Hegemonic International Law.<sup>94</sup> Such a legal regime can roughly be described as a law that is produced by powerful hegemonic States through a certain platform in order to implement their sense of the law, while weaker ones adhere to it in exchange for protection and security. The Council, in his view, might just serve as such a platform. Eyal Benvenisti also has described a similar phenomenon in which States use the platform of IOs to coerce weaker States to their will,<sup>95</sup> explaining that the misleading use of the term “soft law” obscures the imposed will of powerful States and weakens the normative force of sovereign equality and the traditional consent-based structure of international law.<sup>96</sup> The Council’s case, it need be stressed, may represent an even

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92. See Ní Aoláin, *supra* note 52.

93. *Id.*

94. Compare *Hegemonic*, *supra* note 70 at 873 (Explaining the concept of hegemonic international law, as implemented through the UN Security Council, as follows: “[Hegemonic international law] jettisons or severely undervalues the formal and de facto equality of states, replacing pacts between equals grounded in reciprocity, with patron-client relationships in which clients pledge loyalty to the hegemon in exchange for security or economic sustenance. The hegemon promotes, by word and deed, new rules of law, both treaty-based and customary.”); and ALVAREZ, *supra* note 24, at 199–200; with Detlev Vagts, *Hegemonic International Law*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 843 (2001) (Vagts’ narrow and more limited concept of hegemony is adopted by Alvarez).

95. Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STANFORD LAW REVIEW 595, 617–19 (2007); see also Julia C. Morse & Robert O. Keohane, *Contested Multilateralism*, 9 REVIEW OF INTERNATIONAL ORGANIZATIONS 385, 387–88 (2014).

96. See BENVENISTI, *supra* note 13, at 37 (Explaining that the informality of the standardization and “soft law” making by such IOs is no coincidence. Rather, it is “designed, *inter alia*, to preclude those third parties from participating in the working of these [IOs].” He therefore asserts that the labeling of the norms they produce as “soft” is misleading and claims that these IOs “are formed by a group of states pursuing common aims but wishing

more blatant intrusion on States’ sovereignty than what Benvenisti describes, as it involves a P5-led IO organ, which engages in legal activity that is deemed far more intrusive than mere “soft law.”<sup>97</sup> As such, the Council’s engagement in global legislation might seem to be coercive and inappropriate towards other States.

Against the abovementioned standpoints, others present different views, for various reasons.

First are policy-based viewpoints that stress the need to allow the Council to act effectively against current global threats. These pragmatic arguments, it need be noted, mostly reflect standpoints deeming the Council’s global legislation to be appropriate. Eric Rosand, for example, regarded the argument that the Council is not authorized to globally legislate because it can only issue decisions in response to concrete instances as legally inaccurate. However, he added another policy-based layer to his argument, considering the ever-present and non-territorial security threats the Council is tasked to counter:

[This limitation does] not actually appear in the text of the Charter itself . . . [and] . . . is in fact not sufficient to circumscribe the Council’s activity in this area. To continue to read such a limitation into the Charter at a time when the most urgent threats to international peace and security are neither time nor geographically limited would prevent the Council from being able to fulfill its responsibility under the Charter to maintain international peace and security through “prompt and effective action.”<sup>98</sup>

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to retain authority with firm structure. They are not based on legally binding treaties, but rather on intergovernmental coordination.” Even informal IOs, according to his argument, “regulate not only the policies of those within the network, but also, and in many cases primarily, third parties, usually weaker States and individuals.”); *see also* Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (2014).

97. *See, e.g.*, Michelle Nichols, *China Says U.N. Council Members Think India, Pakistan Should Refrain from Unilateral Action in Kashmir*, REUTERS (Aug. 16, 2019), <https://uk.reuters.com/article/uk-india-kashmir-un-china/china-says-u-n-council-members-think-india-pakistan-should-refrain-from-unilateral-action-in-kashmir-idUKKCN1V61KH?il=0> (Providing an example of a State opposition to interference in its domestic issues by the Security Council, which was expressed following the Council’s meeting regarding the Indian removal of the autonomy that the Muslim-majority territory of Jammu and Kashmir enjoyed under the Indian constitution. India’s U.N. Ambassador, Syed Akbaruddin, was quoted: “If there are issues, they will be discussed, they will be addressed by our courts; we don’t need international busybodies to try and tell us how to run our lives. We are a billion-plus people.”).

98. *See* Rosand, *supra* note 5, at 545.

He later stressed, in the same piece, that “the traditional lawmaking approach was proving inadequate for dealing with the global and imminent terrorist threat . . . [therefore, the Council] may have had little choice but to try to fill the void.”<sup>99</sup>

Rosand’s view may have added force in light of the unsuccessful efforts to combat terrorism by the other branches of the United Nations.<sup>100</sup> Moreover, it corresponds with topical calls for a dynamic interpretation of the Charter as a living “quasi-constitutional” text, which should be able to handle new and emerging threats,<sup>101</sup> and cannot have an absolutely immutable char-

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99. *Id.* at 577 (2004); see also Paulus, *Article 29, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 983, 1004 (Bruno Simma et al. eds., 3d ed. 2012) (stressing that the urgency of current terrorist threats might justify attributing global legislative status to Chapter VII-based resolutions, mentioning that “one may doubt the competence of the Security Council to substitute Chapter VII measures . . . for the more burdensome avenue of treaty-making, this procedure may be justified by the special nature of the terrorist threat in the specific case concerned”).

100. See, e.g., Anne-Marie Slaughter & William Burke-White, *Focus: September 11, 2011—Legal Response to Terror: An International Constitutional Moment*, 43 HARVARD INTERNATIONAL LAW JOURNAL 1, 10 (2002) (describing the UN’s failed attempts to draft a comprehensive treaty against terrorism); see also John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 782, 795 (2003) (raising grave concerns regarding the UN’s ineffectiveness in countering global challenges by questioning the legitimacy of the one-nation one-vote system: “is it fair that a voting majority of the UN members today could theoretically encompass less than 5 percent of the world’s population?”); cf. Rosand, *supra* note 5, at 576 (offering several examples of the ineffectiveness that characterizes the UN system, occasionally due to its size and diversity of opinion).

101. See, e.g., Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 628, 633 (2003); see also Frederic L. Kirgis, Book Review, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 975 (1999) (reviewing BARDO FASSBENDER, *U.N. SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE*, (1998)); see also Fraser, *supra* note 10 (illuminating the lively debate over whether the UN Charter is a treaty (which implies legal stasis) or a constitution (which suggests legal dynamism). The author mentions that this question sparked a debate in the 1950s between Soviet Chairman Nikita Khrushchev, who regarded the Charter as a treaty (i.e., static), and Secretary General Dag Hammarskjöld, who regarded it as a constitution, meaning as a response to contemporary security challenges.); see also THOMAS FRANCK, *RE-COURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 5 (2002); see also OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 213–14 (2017) (“Like the American Constitution, the . . . Charter was *idealistic and pragmatic* at once. It was meant not to solve all possible international problems but to solve a particular one—the scourge of interstate war.” (emphasis added)); but see Jose Alvarez, *The Security Council’s War on Terrorism: Problems*

acter.<sup>102</sup> Such a standpoint stems from the dynamism that characterizes constitutional documents worldwide, which are portrayed as breathing, adjustable documents.<sup>103</sup> This school of thought may be best exemplified in the Council’s case through the “effective interpretation” or “implied powers” doctrines.<sup>104</sup> The theory suggests that the Council’s founders could not have

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*and Policy Options, in REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES* 119, 120 (Erika de Wet & Andre Nollkaemper eds., 2003) [hereinafter *War on Terrorism*] (it should be noted, however, that Alvarez believed that the consent of States to the UN Charter, *as a sole justification* for the Council’s expanded interpretation—in which a small group of States sitting as the Council assume formal legislative abilities—is not sufficient); ALVAREZ, *supra* note 24, at 65–69 (Here too Alvarez seeks to conclude that the Council has somewhat moderate “legislative” ability, not fully disqualifying it as the “executive” branch of the UN. Analogizing the UN Charter to the U.S. Constitution, he claims that “[a]s with the U.S. Constitution, which does not confer on the executive branch *general law-making powers*, such general powers are not given to the UN Security Council. That body is, however, charged with responsibility over the peace and security of the community of states and *is enabled to take binding decisions to this end*—just as the U.S. President is given the power to protect the security of the United States as commander in chief of the U.S. armed forces.” (emphasis added)).

102. *Cf. South West Africa Cases, supra* note 27, at 439 (it was Judge Jessup who stated in his dissenting opinion in the 1966 *West Africa Case*, that “[t]reaties—especially multipartite treaties of a constitutional or legislative character—cannot have an absolutely immutable character”); *but see* Alain Pellet, *The Charter of the United Nations: A Commentary of Bruno Simma’s Commentary*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 135, 137 (2003) (book review) (Pellet had interestingly referred to Jessup’s statement arguing that it is “particularly true of the Charter.” It need be noted, however, that while both Rosand and Pellet call for a dynamic reading of the Charter, their conclusions regarding the Council’s legislative authority are different, as the latter argues that “the U.N. is not a legislative body and should not be regarded as such.”).

103. Oscar Schachter, *The Charter’s Origins in Today’s Perspective*, 89 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 45 (1995) (emphasizing the different motives and agendas of the leaders who amended the same constitution over the years, to stress that it is a dynamic, breathing, and changing document).

104. *See Certain Expenses of the United Nations* (Article 17, Paragraph 2 of the Charter), Advisory Opinion, 1962 I.C.J. 151, 168 (July 20) [hereinafter *Certain Expenses*]; *see also Reparation, supra* note 26, at 180; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66, ¶ 25 (July 8) (“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.*” (emphasis added)); *cf. JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 53, 58–59

foreseen the necessary powers—among them, legislative ones—that it would need to effectively perform its functions and fulfill its mandate in the future.<sup>105</sup> They may, then, have intentionally devised an open-ended mandate in order to allow for dealing with future, unforeseen challenges.<sup>106</sup> As a result, based on policy reasonings such as Rosand’s, an interpretation of the Charter that reads global legislative functions into the Council’s mandate may be timely and appropriate. The ICJ accordingly has suggested a *presumption of legality* when an IO determines that an action is appropriate “for the fulfillment of one of the stated purposes of the United Nations.”<sup>107</sup> Based on such logic, an IO, or an IO organ such as the Council, that has not been granted formal global legislative powers in a constitutive treaty, yet is *in need* of such authority in order to ensure international peace and security, might not be acting *ultra vires* when issuing resolutions that apply to all States at all times, as it is pursuing the fulfillment of a declared UN purpose.

A pragmatic approach towards the Council’s competences was also expressed by the International Criminal Tribunal for Rwanda (ICTR) when the court discussed its own creation, as well as that of the International Criminal

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(2d ed. 2009) [hereinafter INTRODUCTION] (discussing the problematic aspects of the doctrine of “attributed powers”—and the tension it may have with the “implied powers” doctrine, mentioning that “[i]f an organization’s powers are limited to those powers explicitly granted, then the organization remains, in effect, *merely a vehicle* for its members rather than an entity with a distinct will of its own, and if it is merely a vehicle for its member states, then it is difficult to see why the particular form of an organization was chosen by those members over, say, a series of occasional conferences, or perhaps even the simple appointment of a joint public relations officer.” (emphasis added)); *see generally id.* at 64 (attempting to reconcile the two doctrines).

105. *See* BENVENISTI, *supra* note 13, at 94 (discussing the “effective interpretation” or “implied powers” doctrines in the wider context of IOs); *see also* INTRODUCTION, *supra* note 104, at 58 (explaining the logic behind the “implied powers” doctrine and claiming it is “at the heart of most of the talk about the powers of international organizations”).

106. *See, e.g.*, Jane E. Stromseth, *An Imperial Security Council? Implementing Security Council Resolutions 1373 and 1390*, 97 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 41, 42 (2003) (expressing a view similar to Rosand’s, claiming that the Council’s expansion of powers is not coincidental, but rather fulfils the Charter’s framers’ will, who intentionally left the terms in Article 39 undefined, in order to afford the Council flexibility when facing new and emerging threats); Agreement Establishing the World Trade Organization, art. 3 ¶ 2 (1995), [https://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](https://www.wto.org/english/docs_e/legal_e/04-wto.pdf) (Providing an example of a relatively open-ended phrasing of an IO’s competences: “The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.”).

107. *See Certain Expenses*, *supra* note 104, at 168.

Tribunal for the former Yugoslavia (ICTY). The ICTR acknowledged that the UN Security Council “explicitly extended international legal obligations and criminal responsibilities to individuals.”<sup>108</sup> Yet instead of stating that the Council acted *ultra vires* when applying such legislative (or quasi-legislative) powers, the court mentioned that it “provided an important innovation of international law,” and that nothing “suggest[s] that this extension . . . was not justified or called for by the circumstances, notably the seriousness, the magnitude and the gravity of the crimes committed during the conflict.”<sup>109</sup>

Alvarez has expressed concerns regarding the implications of the above-mentioned pragmatic interpretations of IOs’ authorities and their resultant expanded powers. He views the presumption that these entities are entitled to use any legal modality to accomplish legitimate purposes as problematic and potentially destructive to the rule of law itself, because it wrongly presumes that IOs are invariably a good thing as regards promoting world stability.<sup>110</sup> He specifies:

[Only] under certain principles of so-called “internal” international institutional law, IOs enjoy certain rights and duties that are said to arise generally as a result of their legal personality, including, some would argue, the *implied power* to take other actions reasonably necessary to fulfill the purposes for which such organizations were established.<sup>111</sup>

One can only assume that such objection to a pragmatic interpretation of IOs’ powers in general would *a fortiori* be relevant to the specific case of the Council as a global legislator. Concerning the ICTR’s abovementioned pragmatic approach, one could also argue that it stems from the core identity of those expressing it and their lack of “objectivity” in the matter. The ICTR is an IO, so expressing an opposite view to the pragmatic approach might undermine its own legitimacy and leeway. Accordingly, some have argued that the “unbridled enthusiasm for international organizations” has led international tribunals to interpret IOs’ authorities beyond their constitutive treaties.<sup>112</sup>

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108. Prosecutor v. Kanyabashi, Case No. ICTR 96-15-T, Decision on Defense Motion on Jurisdiction, ¶ 35 (July 18, 1997).

109. *Id.*

110. See ALVAREZ, *supra* note 24, at 596.

111. *Id.* at 8 (emphasis added).

112. See Jan Klabbbers, *The Life and Times of the Law of International Organizations*, 70 *NORDIC JOURNAL OF INTERNATIONAL LAW* 287, 295 (2001).

A second line of argument regarding the appropriateness of the Council's function as a global legislator draws on its "deeper rationale of representing the community."<sup>113</sup> According to Abbott and Snidal,

Because local disputes might spill over and disrupt the larger community, they affect the general welfare. Such disputes should not be dealt with exclusively by the parties themselves, or by third states intervening for their own private interests, but by collective bodies that consider the effects of the dispute and of external intervention on the general welfare.<sup>114</sup>

Although this statement was presented in the context of the Council's authority to intervene in internal disputes, it also has bearing on our issue. This is because it reflects a pragmatic logic, standing in stark contrast to the abovementioned criticism of the Council for being a selective, unrepresentative, and politicized IO organ.<sup>115</sup> It rather underscores the alleged mutual reliance and "allocated responsibility" that the Council and its member States share,<sup>116</sup> as well as the Council's "public trusteeship role."<sup>117</sup> One indicator to support this presumption is the Council's involvement in the vast majority of non-international armed conflicts.<sup>118</sup> Although this may not detract from arguments regarding the Council's unrepresentativeness, it may at least *imply* that the Council's powers should trace its position of the trustee of the "general welfare" of the international community.

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113. See Abbott & Snidal, *supra* note 12, at 25–26; *but see supra* text accompanying note 71.

114. See Abbott & Snidal, *supra* note 12, at 25.

115. See *supra* text accompanying note 71.

116. Christiane Ahlborn, *To Share or Not to Share? The Allocation of Responsibility Between International Organizations and Their Member States*, 88 (No. 3/4) DIE FRIEDENS-WARTE 45 (2013).

117. See BENVENISTI, *supra* note 13, at 143 (arguing that the lack of acknowledgment of IOs' "public trusteeship role" could even dilute the already narrow interpretation of certain IOs regarding their own obligations to administrative law); *cf.* G.A. Res. 60/1, ¶ 139 (Oct. 24, 2005) (The 2005 World Summit Outcome expressed such recognition when discussing the "responsibility to protect" doctrine. The General Assembly clarified that enforcement actions to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity are in the remits of the Council).

118. See Fox, Boon & Jenkins, *supra* note 16, at 663 (Analyzing 1057 resolutions between 1990 and 2013, representing 56 NIACs, the authors show that the Council passed resolutions for the majority of NIACs (76%), and confirm that the Council became slightly more involved in conflicts that began after 1990 (80%). It should also be mentioned that the Council's high involvement in NIACs is due to the fact that most conflicts these days are non-international.).

A third line of argument supporting the appropriateness of the Council’s function as a global legislator seeks to counter the allegations regarding its politicization, or to be more precise, that its “politicization” is inherently bad. Politicization, in this regard, is an inherent part of any legislative process. When balanced with constitutive values and principles, it does not necessarily paint the legislative process as inappropriate, but rather as holistic and heterogeneous. Council resolutions or imposed obligations of legislative authority—which apply to all States at all times—may entail political considerations which are balanced by the principles anchored in the UN Charter. In the famous *Tadić* case, trying to tackle the issue of politicization regarding the Charter’s provisions that justify resort to power, the Court addressed the Charter’s inherent checks and balances as a means of preventing unfettered political discretion:

The situations justifying resort to the powers provided for in Chapter VII are a “threat to the peace”, a “breach of the peace” or an “act of aggression”. While the “act of aggression” is more amenable to a legal determination, *the “threat to the peace” is more of a political concept*. But the determination that there exists such a threat *is not a totally unfettered discretion*, as it has to remain, at the very least, *within the limits of the Purposes and Principles of the Charter*.<sup>119</sup>

The Council’s adherence to the Charter’s purposes and principles can be derived, inter alia, from Article 24 of the UN Charter, which states that the Security Council acts on behalf of the UN member-States.<sup>120</sup>

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119. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 29 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter *Tadić*] (emphasis added); *but see* Monica Hakimi, *Pigs, Positivism, and the Jus ad Bellum*, EJIL:Talk! (Apr. 27, 2018), <https://www.ejiltalk.org/pigs-positivism-and-the-jus-ad-bellum/> (claiming, on the other hand, that in the area of *jus ad bellum* and “threat to peace,” “law and politics have always been, are now, and will for the foreseeable future be interconnected”).

120. *See, e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (21 June) (finding the legal basis for Security Council Resolution 276—which it held to be binding—in Article 24(1), despite South Africa’s claims that Article 24 did not authorize the Council to act in instances that are not covered by provisions of Chapters VI, VII, VIII, and XI of the Charter); *cf.* Kirsch, *supra* note 73, at 710 (arguing that in order for a UN organ to be able to determine its jurisdiction, such determination must be supported by the member States).

A fourth, yet slightly ambiguous, view regarding the appropriateness of the Council's function as a global legislator can be derived from Breakey's abovementioned methodology for identifying global legislation.<sup>121</sup> Unlike the other standpoints presented in this subpart, which measure the appropriateness of the Council's engagement in global legislation in definitive terms, Breakey's theory is characterized by vagueness simply because it is based on the ad hoc analysis of a given resolution at a time. Like domestic legislation, he argues, the Council's resolutions impose duties unilaterally, "that is, a small (representative or otherwise) group imposes binding duties on a larger population."<sup>122</sup> However, while some resolutions might be deemed sufficiently *appropriate* to be considered as legislation, others don't meet the bar in his view. In order to assess the normative properties of a legal or quasi-legal provision made by the Council, Breakey suggests considering the first five dimensions of his theory's taxonomy: narrow binding-ness (with a distinction between "hard" and "soft" law); determinacy; external authority; generality; and novelty.<sup>123</sup> The clearest cases in which Council resolutions may be appropriately deemed as legislation, he explains, are those that "rank high on the dimensions of binding-ness, generality and novelty."<sup>124</sup> If certain resolutions also entail determinacy and impose external authority, then they amount to "that rare phenomenon in international law: 'legally binding regulation.'"<sup>125</sup> Despite allowing room for flexibility, such indefinite, ad hoc analysis is likely to only intensify the controversies over the Council's global legislation attempts.

Adding another relatively vague measure for determining the appropriateness of the Council's global legislative function, Trudy Fraser concludes that its legislative capacity "must be measured against the 'efficacy' of the Council in maintaining international peace and security."<sup>126</sup> Such a standard,

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121. See Breakey, *supra* note 33.

122. *Id.* at 68 n.2.

123. *Id.* Breakey also discusses "legitimacy" as an additional potential dimension for evaluating the comprehensive legality of the Council's resolutions, yet chooses to leave it outside the basic five-dimensional taxonomy, which allows a thorough analysis of a specific Council resolution.

124. *Id.* at 67.

125. *Id.*

126. Fraser, *supra* note 10, at 293–94.

however, is not only inequivalent to any other form of identifying either domestic or international legislation but is also difficult to measure.<sup>127</sup>

The abovementioned views regarding the Council’s function as a global legislator present a deep controversy, which is particularly intensified by the lack of agreement regarding a general definition of global legislation, the ambiguity of the Council’s mandate to include a legislative authority under the UN Charter, and the normative considerations and doubtful appropriateness of its engagement in such activity (of which some, as explained above, are highly dubious). While the main common motive among those who object to the Council’s functioning as a global legislator relates to the potential misuse of its powers, those in favor of its conduct mostly rely on pragmatic reasoning, aimed at allowing it to effectively counter global security threats.

In order to concretize and illustrate the issue further, the next chapter demonstrates how some of the above arguments apply to two types of Council resolutions which are regarded in this article as legislative resolutions: case-specific “threat to peace” resolutions which entail general rules or obligations, and thematic resolutions. It does so in correspondence with Heupel’s broad definition (though it does not condition the amendment of domestic law for the manifestation of global legislation, as Heupel does) and touches on the strengths and weaknesses of the presented viewpoints by discussing representative examples of the two types of resolutions.

#### IV. CASE-SPECIFIC “THREAT TO PEACE” AND THEMATIC RESOLUTIONS

Heupel distinguishes between narrow and broad definitions of “legislation” in the Council’s context that appear in the literature.<sup>128</sup> She concludes that those who adhere to a broader definition deem both case-specific “threat to peace” resolutions and thematic ones a source for such legislation, while those who take a narrower approach relate only to the latter. Case-specific

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127. It should be noted, however, that valid claims regarding the Council’s inefficiency within some of its thematic resolutions have been made and occasionally found appealing. See, e.g., Noelle Quenivet, *The Security Council as Global Executive but not Global Legislator—The Case of Child Soldiers*, in *THE SECURITY COUNCIL AS GLOBAL LEGISLATOR*, *supra* note 10, at 160 (arguing that the Council’s resolutions on the issue of child soldiers in armed conflict were ineffective, as they permitted member States’ interests to direct their compliance, not necessarily their Council-mandated obligations).

128. Heupel, *supra* note 51, at 124.

“threat to peace” resolutions, as will be demonstrated below, may entail general rules, meeting Yemin’s definition of “legislative authority.” This article will therefore adhere to the broader definition described by Heupel, stressing the controversy over the Council’s functioning as a global legislator within these two types of legislative resolutions. However, it does not condition, as mentioned, the amendment of domestic law for the manifestation of legislation.

#### A. Case-Specific “Threat to Peace” Resolutions

Case-specific “threat to peace” resolutions are aimed at addressing specific instances in which a threat to peace has arisen. As such, they are allegedly not meant to set general rules for external matters, nor to apply to actors, States, or entities that are not implicated in the specific instance. The discussion regarding chosen resolutions in this subpart, however, demonstrates that this is often not the case. Through the application of different standards, the Council attempts to set general rules for future instances in a precedential manner. The Council’s engagement in such resolutions implies its determination to broaden its mandate to include legislative authority.<sup>129</sup>

Harper, for example, attempted to demonstrate that in certain actions against Iraq and Libya, the Council “explicitly created specific legal obligations for those states and implicitly for all states.”<sup>130</sup> In the Iraqi context, Security Council Resolution 687 called for a permanent ceasefire agreement between Iraq and Kuwait and required Iraq to destroy all of its chemical, biological, and nuclear weapons capabilities.<sup>131</sup> According to Harper, this resolution did not limit its provisions to Iraq’s treaty obligations only. In fact, it created new obligations for Iraq that did not exist prior to its enactment.<sup>132</sup> Supportive of this argument is the fact that the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous and Other Gases calls upon States to refrain from the *use* of chemical weaponry. The Council,

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129. See Fraser, *supra* note 10, at 190 (“The emergence and culmination of these ad hoc quasi-legislative and quasi-judicial decisions—wherein the Council assumes the capacity to determine member states’ specific rights and duties in case of specific circumstances—represents a growing determination by the Council to assume a broad mandate for legislative practice for the protection of international peace and security.”).

130. Harper, *supra* note 52, at 127.

131. S.C. Res. 687 (Apr. 9, 1991).

132. Harper, *supra* note 52, at 127–28.

on the other hand, mandated the “destruction” of such weapons, prohibiting Iraq from *possessing* them.<sup>133</sup> According to Harper,

By determining that Iraq’s mere possession of such chemicals is a threat to the peace, the Council created new legal obligations for Iraq. The obligations arise out of Article 25, which requires all states to comply with Security Council determinations. *The Council has acted legislatively to the extent that Resolution 687 goes beyond Iraq’s obligations under international law.*<sup>134</sup>

The Council hence legislated in the sense that the creation of such “new legal obligations” towards Iraq may set the standard of what is expected from other States in similar situations. It may have offered a binding interpretation that will inevitably affect third-party interpretations. That is to say that if the Council did not set an *obligation* (to avoid possessing chemical weapons), it at least set a *binding interpretation* (the conceptual move from “usage” to “possession”).

A similar argument was made in regard to Security Council Resolutions 731 and 748.<sup>135</sup> Resolution 731, which was passed under Chapter VI, referred to “acts of international terrorism that constitute threats to international peace and security.”<sup>136</sup> It reaffirmed Resolutions 286 and 635,<sup>137</sup> in which States were called upon to take all possible legal steps to prevent any interference with international civil air travel, and to cooperate in devising and implementing measures to prevent acts of terrorism. Resolution 731 also expressed concerns over the results of investigations that implicated Libyan officials in connection with the destruction of Pan Am Flight 103 and Union de Transports Aeriens Flight 772. It strongly deplored the fact that the Libyan government had not responded effectively to requests made by France, the United Kingdom, and the United States to fully cooperate in establishing responsibility for the terrorist acts and called upon all States to assist in the apprehension and prosecution of those responsible for this criminal activity.

Resolution 748, which reaffirmed Resolution 731 and, in contrast to it, was adopted under Chapter VII, determined that the Libyan regime had failed to demonstrate its renunciation of terrorism and had not surrendered

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133. S.C. Res. 687, *supra* note 131, ¶ 8.

134. Harper, *supra* note 52, at 128 (emphasis added).

135. S.C. Res. 731 (Jan. 21, 1992); S.C. Res. 748 (Mar. 31, 1992).

136. S.C. Res. 731 (Jan. 21, 1992).

137. S.C. Res. 286 (Sept. 9, 1970); S.C. Res. 635 (June 14, 1989).

those who were suspected in the Lockerbie bombing.<sup>138</sup> Interestingly, at the time of the matter, Libya was a party to the Montreal Convention, which grants States the option of either extraditing individuals to a State willing to exercise jurisdiction over an individual who allegedly committed a terrorist act against a civilian aircraft, or establishing jurisdiction over the case themselves.<sup>139</sup> The Libyans claimed that the Council's request exceeded Libya's obligations under the Montreal Convention, to which the United States and the United Kingdom were parties as well.<sup>140</sup> According to Harper, this act was a "far-reaching legislative action taken by the Council."<sup>141</sup>

Happold, on the other hand, claimed that especially prior to September 11, the Council took a narrower approach in its resolutions (particularly when responding to terrorism), which did not amount to legislation.<sup>142</sup> The Council's Chapter VII-based resolutions at the time, he argued, were "corresponding" with particular threats to peace, arising from a given situation, and allegedly did not attempt to create a new legal regime within international law. This stand is based on his view regarding the Council's legislative authority and its competence to respond to concrete situations only. Similarly, as regards Resolutions 687, 731, and 748, the obligations imposed on Iraq and Libya arose out of specific circumstances, were designated directly for those States, and did not affect other countries. Consequently, in none of these resolutions did the Council "really legislate," according to Happold.<sup>143</sup>

Similar claims about the Council acting as a global legislator have also been raised in connection with the establishment of the two international

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138. See Happold, *supra* note 6, at 595 ("Much the same procedure was followed by the Security Council in respect of the Sudanese government's failure to surrender those persons suspected of the attempted assassination of President Mubarak of Egypt in 1995 [S.C. Res. 1044 (Jan. 31, 1996) and S.C. Res. 1054 (Apr. 26, 1996)], and the Taliban's failure to surrender Osama bin Laden following the 1998 bombing of the US embassies in Kenya and Tanzania [S.C. Res. 1214 (Dec. 8, 1998); S.C. Res. 1267 (Oct. 15, 1999); S.C. Res. 1333 (Dec. 19, 2000); S.C. Res. 1363 (July 30, 2001)].").

139. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, arts. 5, 7, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7470.

140. *Lockerbie*, *supra* note 66, ¶ 38–39.

141. Harper, *supra* note 52, at 129.

142. Happold, *supra* note 6 (Happold thereby seeks to focus on the Council's thematic resolutions, which became more frequent after the September 11 terrorist attacks. This type of resolution will be thoroughly discussed below, *infra* Part IV(B)).

143. *Id.* at 596; cf. Bosch, *supra* note 55, at 97 (noting that nations and scholars alike have complained that the Council is only authorized to handle concrete situations, not to act as a "dictator," and has therefore overstepped its authority in enacting Resolutions 1373 and 1540).

criminal tribunals: the ICTR<sup>144</sup> and the ICTY.<sup>145</sup> The establishment of these two ad hoc tribunals—which can issue binding judgments—has already been described as “precariously close to international legislation.”<sup>146</sup> However, a few indicators suggest that the Council did not globally legislate when establishing these international tribunals, but rather “simply established mechanisms whereby infractions of the existing law could be punished.”<sup>147</sup> The two tribunals, as compared to the working definition of global legislation, were ad hoc institutions designed to deal with particular situations,<sup>148</sup> did not create any new forms of law,<sup>149</sup> and had strict territorial and temporal jurisdiction.<sup>150</sup> Ultimately, it was one of the tribunals itself—the ICTY—that clarified the matter by stating “[t]here is . . . no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.”<sup>151</sup>

On other scholarly views, conversely, the Council was indeed legislating when establishing these tribunals. In his report regarding the ICTY, the UN Secretary General confirmed that the Council established the court in response to a particular situation and did not create or purport to legislate the

144. S.C. Res. 955 (Nov. 8, 1994).

145. S.C. Res. 827 (May 25, 1993).

146. Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 EUROPEAN JOURNAL OF INTERNATIONAL LAW 326 (1995).

147. Happold, *supra* note 6, at 596–97; *but cf. Secretary-General’s Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, reprinted in 38 INTERNATIONAL LEGAL MATERIALS 1159, 1170 (1993) [hereinafter *ICTY Aspects*] (in his report on the establishment of the Yugoslavia Tribunal, the UN Secretary-General emphasized that the law applied by the tribunal was “beyond any doubt part of customary law”).

148. *See Int’l Law Comm’n, Rep. on the Work of its Forty-Sixth Session*, U.N. Doc. A/49/10, at 22 (1994) (According to the report: “Chapter VII of the Charter only envisaged action with respect to a particular situation.” Due to a similar logic, the option of founding the International Criminal Court through a treaty—rather than, *inter alia*, a UN Security Council resolution—was looked upon favorably.).

149. *See ICTY Aspects*, *supra* note 147, at 1169 (the UN Secretary’s General stand, in this regard, was that “in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to ‘legislate’ that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law”).

150. For the confinement of the tribunals to specific geographical areas and time, *see* S.C. Res. 827, *supra* note 145, arts. 1, 8; S.C. Res. 955, *supra* note 144, arts. 1, 7.

151. *See Tadic*, *supra* note 119, ¶ 43.

law according to which the court would act.<sup>152</sup> Allegedly, these are indicators that belie the Council's legislative authority function. However, the Secretary-General might not have addressed the possible far-reaching implications of some procedural provisions in the resolutions establishing the courts. Such provisions, according to certain views, could be seen as legislative, as they "establish new rules that have required some States to change their domestic legal process."<sup>153</sup> Nevertheless, they may have set the standard of what is expected from other States in relevant situations and might offer binding interpretations that will inevitably affect third-party interpretations.

### B. Thematic Resolutions

After having considered these selected case-specific, "threat to peace" legislative resolutions, which entail general rules or obligations, no clear-cut conclusion presents itself. Certain examples—and their respective commentaries—suggest that the Council has exercised global legislative powers through these resolutions, while some clearly indicate the opposite. Be that as it may, a stronger example for the Council's adoption of a comprehensive legislative role can be found in its increased engagement in thematic, Chapter VII-based resolutions.

Indeed, besides taking measures against material threats such as individuals associated with Al-Qaeda,<sup>154</sup> the Council has gradually started to engage in thematic resolutions, meant to prevent tangible threats from developing in the first place.<sup>155</sup> This type of resolution is argued to be of a legislative

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152. See *supra* text accompanying note 149.

153. See Rosand, *supra* note 5, at 564; but see Vesselin Popovski, *The Security Council and the International Criminal Court*, in *THE SECURITY COUNCIL AS GLOBAL LEGISLATOR*, *supra* note 10, at 266 (Suggesting a more moderate interpretation than Rosand's regarding the meaning of the Council's establishment of the two ad-hoc criminal tribunals. According to Popovski, the establishment of the two tribunals filled a gap in international criminal law. This type of "jurisdictional activism" had a positive impact—rather than a legislative meaning in this article's context—which resulted in the establishment of the International Criminal Court and the adoption of the Rome Statute. A similar positive impact occurred during the establishment of the Nuremburg and Tokyo tribunals following World War II, which influenced States to adopt the 1948 Genocide Convention and 1949 Geneva Conventions.).

154. S.C. Res. 1267 (Oct. 15, 1999); see also S.C. Res. 1390 (Jan. 16, 2002); cf. Heupel, *supra* note 52, at 124–42 (finding that the Council's capacity to produce legislation has developed significantly since Resolution 1267).

155. But see Deplano, *supra* note 56, at 2095 (Noting that the vast majority of UN Security Council resolutions are still regional. For example, between 2004 and 2013, the Council

nature as, similarly to domestic legislation, it applies equally to all States at all times and in all circumstances.<sup>156</sup> According to Fraser, “[t]he emergence of thematic Security Council resolutions against global generic threats—wherein the rights and duties of member states are held accountable against a universal normative standard of practice—has been likened to a full-scale legislative function that might prove more effective than traditional Chapter VII enforcement mechanisms.”<sup>157</sup>

The thematic resolutions encompass an impressive spectrum of subjects, from an immediate end to the use of child soldiers and the protection of civilians in armed conflict;<sup>158</sup> through the global impact of HIV/AIDS<sup>159</sup> and United Nations peacekeeping;<sup>160</sup> to the protection of United Nations personnel, associated personnel, and humanitarian personnel in conflict zones.<sup>161</sup>

Discussing the Council’s deepening reach into the criminal law domain of States, for example, Ní Aoláin counts six thematically diverse terrorism-related resolutions in 2017 alone.<sup>162</sup> Resolution 2396 in particular—according to her argument—has severe domestic implications for the human rights obligations of States and could potentially neutralize domestic institutions as they try to effectively protect citizens and noncitizens alike.<sup>163</sup>

A lively legal debate regarding the Council’s global legislative powers has centered on UN Security Council Resolutions 1373 and 1540.<sup>164</sup> Resolution 1373 was primarily aimed at burdening and harming terrorist groups in multiple ways. Methods listed in it include the prevention and suppression of

adopted 611 resolutions. While 502 (77%) were regional, only 58 (16%) were thematic. The remaining 51 resolutions (7%) regarded actions previously agreed upon by other UN agencies and seconded by the Security Council).

156. *Cf.* THE LAW DICTIONARY, *supra* note 20.

157. Fraser, *supra* note 10, at 290 (emphasis added).

158. *See* S.C. Res. 1460 (Jan. 30, 2003) (on Children and Armed Conflict); *see also* S.C. Res. 1296 (Apr. 19, 2000) (on protection of civilians in armed conflicts).

159. *See* S.C. Res. 1308 (July 17, 2000).

160. *See* S.C. Res. 1422 (July 12, 2002).

161. *See* S.C. Res. 1502 (Aug. 26, 2003).

162. *See* Ní Aoláin, *supra* note 52 (listing S.C. Res. 2341 (Feb. 13, 2017); S.C. Res. 2354 (May 24, 2017); S.C. Res. 2368 (July 20, 2017); S.C. Res. 2370 (Aug. 2, 2017); S.C. Res. 2395 (Dec. 21, 2017); and S.C. Res. 2396 (Dec. 21, 2017)).

163. It is important to stress that Ní Aoláin criticizes not only the content of these resolutions, but also their undermining of the traditional basis of consent for international lawmaking, and the resulting harm to the sovereignty of States that do not sit on the Council.

164. *See* S.C. Res. 1373 (Sept. 28, 2001); S.C. Res. 1540 (Apr. 28, 2004).

financing of terrorist acts;<sup>165</sup> directing States to “refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts”;<sup>166</sup> and the call for States to “find ways of intensifying and accelerating the exchange of operational information,” particularly concerning terrorist persons or networks.<sup>167</sup> It also calls on States to adjust their national laws accordingly, through “full implementation of the relevant international conventions relating to terrorism,”<sup>168</sup> the establishment of terrorist acts as “serious criminal offences in domestic laws and regulations,” while ensuring that the punishment they draw “duly reflects the seriousness of such terrorist acts,”<sup>169</sup> and the amendment of immigration laws to ensure that no “asylum-seeker has . . . planned, facilitated or participated in the commission of terrorist acts.”<sup>170</sup> Additionally, it established the Counter Terrorism Committee, which is responsible for monitoring States’ compliance with and implementation of the resolution.<sup>171</sup> Resolution 1540 calls on all States to refrain from providing “any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery.”<sup>172</sup> It also requires all States to adopt and enforce appropriate laws to this effect, alongside other “effective measures” to prevent the proliferation of such weapons.<sup>173</sup> Additionally, it established a special UN Security Council committee, which reports to the Council on the implementation of its provisions.<sup>174</sup>

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165. See S.C. Res. 1373, *supra* note 164, art. 1, ¶ a.

166. *Id.* art. 2, ¶ a.

167. *Id.* art. 3, ¶ a (this paragraph also orders States to contend with “forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups”).

168. See S.C. Res. 1373, *supra* note 165.

169. *Id.* art. 2, ¶ e.

170. *Id.* art. 3, ¶ f.

171. *Id.* art. 6, ¶ a; see generally Counter-Terrorism Committee Executive Directorate, Technical Guide to the Implementation of Security Council Resolution 1373 (2001) and Other Relevant Resolutions (2017), [https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/cted-technical-guide-2017\\_1.pdf](https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/cted-technical-guide-2017_1.pdf) (provides background regarding the working process of the committee).

172. S.C. Res. 1540, *supra* note 164, art. 1.

173. *Id.* arts. 2, 3.

174. *Id.* art. 4.

Isobel Roele, who has discussed both resolutions, highlights them as the most prominent examples of the Council’s expanding legislative role.<sup>175</sup> Others have described them as “innovative,” despite scathing criticism by commentators that the resolutions fall outside the Council’s mandate.<sup>176</sup> Resolution 1373 in particular has even been regarded as the “apogee” of the Council’s tendency to expand its power following the September 11 terrorist attacks and as a resolution that “may mark the beginning of a new stage in the practice of the Council.”<sup>177</sup> Others claim that it marked the beginning of the Council’s “legislative phase.”<sup>178</sup> Resolution 1540 was described in a press conference by the Council’s president as “the first major step towards having the Security Council legislate for the rest of the United Nations’ membership.” The president went on to assert that the “Council would be needed more and more to do that kind of legislative work.”<sup>179</sup>

These two “quasi-legislative resolutions,” according to Roele, enabled the Council—in pursuit of its goal of maintaining international peace and security—to establish “shared frameworks for action,” which also gave birth to different subsidiary bodies to the Council.<sup>180</sup> Trying to prevent terrorist financing as well as the proliferation of chemical, biological, and nuclear weapons, these bodies treat the international realm as a controlled “bounded space that transnational threats cannot escape.”<sup>181</sup> They are focused on eradicating gaps within weaker countries and creating an “entirely regulated space” through disciplinary measures—such as the above-mentioned Counter Terrorism Committee of Resolution 1373 and the committee established by Resolution 1540.<sup>182</sup> These mechanisms apply different techniques which have been labeled “infra-law” (rather than “formal law”), in an attempt to

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175. Roele, *supra* note 52.

176. See Rosand, *supra* note 5, at 545.

177. Happold, *supra* note 6, at 594; see also *War on Terrorism*, *supra* note 101, at 120 (stating that the Council was acting as a “global law maker” within Resolutions 1373 and 1540).

178. See Talmon, *supra* note 52, at 175.

179. U.N. Press Briefing, Press Conference by Security Council President (Apr. 2, 2004), <https://www.un.org/press/en/2004/pleugerpc.DOC.htm>.

180. Roele, *supra* note 52, at 189.

181. *Id.* at 190.

182. *Id.* at 196; see generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 222 (Alan Sheridan trans., 1995) (discussing the meaning of “disciplinary power”).

control States' efforts to implement the directives in these resolutions.<sup>183</sup> This totalizing logic, according to Roele, can be implemented and amplified only through such quasi-legislative resolutions.<sup>184</sup> Resolutions 1373 and 1540 therefore allegedly are of a legislative nature in particular, as they apply to all States and reflect a coherent logic according to which combating terrorism requires an "aggregate effort" accompanied by the demand for "the right sort of participation" by States.<sup>185</sup>

Issuing these resolutions, the Council indubitably operated on the principle of *effectiveness*, rather than *legitimacy* or nonintervention in domestic matters.<sup>186</sup> Accordingly, considerable criticism was levelled at its alleged lack of respect for States' sovereignty, and its bias and politicization, aimed primarily at promoting the P5's interests. Allegations regarding the inappropriateness

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183. Roele, *supra* note 52, at 202 (explaining that these mechanisms usually rely on the technical expertise of professionals such as financial regulators, border guards, and police units).

184. *Id.* at 193 (explaining that the Council thereby "flummoxes the association of Chapter VII with centralized, top-down action because it uses Chapter VII to institute a decentralized, bottom-up approach to collective security in which each UN member state is a link in an unbroken chain of counterterrorism").

185. *Id.* at 193–96 n.32 (based on SCOTT BARRETT, WHY COOPERATE? THE INCENTIVE TO SUPPLY GLOBAL PUBLIC GOOD 4 (2007), Roele refers to this strategy as a "weakest-link" global public good which demands an "aggregate effort" response by all States); *accord* G.A. Res. 60/288, The United Nations Global Counter-Terrorism Strategy, art. 3 (Sept. 8, 2006) (Such cross-country force buildup for counterterrorism was acknowledged as "a core element of the global counter-terrorism effort" in the UN's strategy, underscoring how rooted the "weakest-link" logic may be even within the General Assembly: "We recognize that capacity-building in all States is a core element of the global counter-terrorism effort, and resolve to undertake the following measures to develop State capacity to prevent and combat terrorism and enhance coordination and coherence within the United Nations system in promoting international cooperation in countering terrorism."); *cf.* Charney, *supra* note 25, at 530 (expressing a similar approach by mentioning that "in the case of international terrorism, one state that serves as a safe haven for terrorists can *threaten all*. War crimes, apartheid or genocide committed in one state might threaten international peace and security *worldwide*." (emphasis added)).

186. *See* Roele, *supra* note 52, at 190 (discussing the logic of these resolutions, Roele explains that the main reasoning behind the Council's aggressive quasi-legislative attempts is not necessarily *legitimacy* for its actions, but rather *efficiency*); *see generally* Buchanan, *supra* note 42 (discussing legitimacy as a key-factor for determining international law-making institutions' "right to rule").

of its function as a global legislator hence seemed inevitable.<sup>187</sup> As a balancing measure and in order to legitimize its actions, Roele claims, the Council encouraged the “universal participation” of States in the issuance of these resolutions, as well as other selected thematic resolutions.<sup>188</sup> First, due to the understanding that legislative resolutions should align with generally agreed standards of constitutional lawmaking, the Council went to great lengths to show that Resolutions 1373 and 1540 were needed and lawful, putting forward political and legal arguments. In this regard, it also convened open meetings to provide non-Council members with a platform to express their views on the matter. Second, it focused on managerial—rather than enforcement—compliance methods, to assure States that they had a certain amount of flexibility regarding the implementation of these resolutions. Third, Council members attempted to advise relevant States to voluntarily sign the conventions that have been imposed on them through these resolutions.

Thought-provokingly, Roele claims that the “corollary of this approach is the decentralization of the administration of collective security.”<sup>189</sup> This author would humbly disagree, as the exact opposite might be true. Resolutions 1373 and 1540 enabled the Council to standardize counterterrorism methods worldwide. The Council’s acknowledgment of its lack of tools to independently execute its counterterrorism policy and the need for States’ cooperation may not necessarily reflect “decentralization”—as Roele

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187. See Roele, *supra* note 52, at 193–96; see also Peter Lehr, *Security Council Resolutions on Somali Piracy, in THE SECURITY COUNCIL AS GLOBAL LEGISLATOR, supra* note 10, at 143 (making similar arguments in connection with the thematic resolutions on maritime piracy and suggesting that the politicization of the threats against which they were drawn up must be considered as well).

188. Roele, *supra* note 52, at 191, 206 (noting yet another inclusive and gradual method the Council has adopted within Resolutions 1373 and 1540, as neither of them ordered the Financial Action Task Force recommendations to be formally binding on all States); see also Bosch, *supra* note 55, at 97; but see JOVANOVIĆ, *supra* note 28, at 168 (Exemplifying the strict terminology the Council uses when wishing to unilaterally impose its will on other countries through Chapter VII; mentioning Resolution 1199, where “the Council explicitly states that it is ‘[a]cting under Chapter VII of the Charter of the United Nations,’ and it then proceeds to ‘demand’ and ‘request’ certain behavior from the involved parties, to ‘insist’ upon their action or inaction, and to ‘decide’ on certain matters.” (brackets in original)).

189. Roele, *supra* note 52, at 196, 210–12 (detailing various disciplinary measures the Council employs to support that effort, from the establishment of inspection mechanisms such as the abovementioned Counter Terrorism Committee, through mutual evaluation reports, to ranking—which can provide incentives for improvement, yet can border on “shaming”); see also FOUCAULT, *supra* note 182, at 222 (explaining that implied disciplinary measures reflect “the other, dark side” of the formal legal realm).

claims—but rather a sophisticated, de facto centralization through its subsidiaries—the States (weaker and stronger alike). The bottom line, however, is similar: the described process seems, at least *prima facie*, to be a sophisticated act of global legislation.

Further evidence for the legislative authority of the Council regarding thematic resolutions can be found in States' statements at the Security Council in support of Resolution 1540. The Algerian representative pragmatically implied that the Council has legislative powers in light of the legal vacuum that existed at the time, explaining that “in the absence of binding international rules . . . it is the responsibility of the Security Council to act.”<sup>190</sup> The Spanish representative expressed a more definitive view regarding the Council's *authority* to globally legislate, stating that Spain “has always felt that it was within the Council's competence to take action,” and adding that since “the Council is legislating for the entire international community, we welcome the fact that this resolution was adopted by consensus.”<sup>191</sup> In keeping with the definition of legislative authority, the British representative also discussed “the binding nature on all States of the obligations” that Resolution 1540 contains.<sup>192</sup> Stressing that Resolution 1540 applies to all, he then mentioned that the obligations “in the legally binding areas set out in this resolution are exactly that: a binding obligation on all States.”<sup>193</sup>

Despite supportive views regarding the Council's authority to globally legislate and the appropriateness of its thematic resolutions, even Rosand has admitted that by adopting both thematic Resolutions 1373 and 1540, the Council may have stretched “the laws of law-making.”<sup>194</sup> Happold, based on his firm views regarding the Council's lack of authority to function as a legislator in non-particular instances, concluded that in enacting Resolution 1373, for instance, the Council simply acted *ultra vires*.<sup>195</sup> Indeed, although a potentially flexible policy-based interpretation of the Council's authority

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190. Statement by Abdallah Baali, Representative of Algeria, to the U.N. Security Council, Provisional Verbatim Record of the 4956th Meeting of the Security Council, U.N. Doc. S/PV.4956, at 7 (Apr. 28, 2004).

191. Statement by Inocencio Arias, Representative of Spain, to the U.N. Security Council, *in id.* at 8.

192. Statement by Emyr Jones Parry, Representative of the United Kingdom, to the U.N. Security Council, *in id.* at 7.

193. *Id.*

194. Rosand, *supra* note 5, at 577–78.

195. Happold, *supra* note 6.

could justify the adoption of an "innovative" approach to current international threats,<sup>196</sup> for Happold it seems not enough. Ultimately, based on his ad hoc analysis, Breakey suggests not drawing any conclusions specifically from Resolutions 1373 and 1540 as regards other Council resolutions. In his view, even if their "binding-ness and generality" could serve as an indicator of the Council's legislative (or at least quasi-legislative) authority, for other resolutions "categorization will not be as straightforward, and could require careful mapping onto the five key normative properties."<sup>197</sup>

## V. CONCLUSION

States are and will remain the primary subjects of international law. They are its main creators and amenders. Those who forget that fact and follow the intellectual drift of current trends are likely to be ignored and rejected. As Shand Watson claimed, "disregarding the importance of state consent by an academic observer is equivalent to a physicist disregarding the law of gravity because he prefers the results that can thus be obtained."<sup>198</sup>

However, the Council's release from the "veto chains" that characterized the Cold War years has led to its intensive engagement in widespread activity, which peaked around its global legislation attempts. As this article initially attempted to demonstrate, the term "global legislation" is contested on its own. There are widely divergent viewpoints, particularly regarding the *authority* to globally legislate by either States or IOs. There is also a lack of consensus regarding the *form* of global legislation, whether it includes IOs' resolutions, for example, alongside the two traditional lawmaking methods of international law: treaties and custom. The vagueness surrounding this term in the legal literature leads to confusion in the Council-related discussions. In an attempt to examine the different arguments on the matter, this article therefore initially offered a working definition of global legislation, based on the widely accepted definition of "legislative authority" to issue binding resolutions or general rules or obligations that apply to all States at all times.

Examining the discussions regarding the Council's alleged global legislation in light of our working definition of the term, this article found that the conclusions are mainly articulated through two types of arguments. The first

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196. See Rosand, *supra* note 5, at 578.

197. Breakey, *supra* note 33, at 67.

198. Shand Watson, *State Consent and the Sources of International Obligation*, 86 PROCEEDINGS OF THE ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 110 (1992).

discuss the Council's *authority* to engage in global legislation. Arguments in this family primarily are based on a strict reading of the Charter, as opposed to a flexible interpretation of its wording. The second family of arguments assesses the *appropriateness* of the Council's conduct. On the one hand, arguments in this family relate to the problems entailed by the Council's characteristics as an unbalanced, selective, unrepresentative, and politicized IO organ, which is controlled by the powerful P5; its alleged lack of obligation to comply with international law under Chapter VII; and the precedential value of its resolutions. Counter arguments in the same family, on the other hand, stress the need to allow the Council to effectively counter global security threats, based on the "effective interpretation" of its mandate; its deeper rationale of representing the global community; and its adherence to the principles of the Charter, despite political tendencies among its member-States. Some scholars have even suggested an ad hoc examination to evaluate the appropriateness of the Council's conduct.

The Council's engagement in global legislation appears to consist primarily of thematic resolutions, or general rules or obligations within case-specific "threat to peace" resolutions. In this article, they have been referred to as "legislative resolutions." The controversies in the matter have been stressed by presenting examples of such legislative resolutions. Ultimately, while this article did not lay a thorough policy-based solution, it stressed the need in designing one. As was demonstrated by the presented viewpoints on the matter, a proper potential policy-based solution would have to satisfy two conditions: First, it should not be unduly restrictive, in order to allow the Council to operate effectively considering its centric role in maintaining international peace and security; Second, it should not be too wide, in order to restrain the Council from abusing its powers and maintain its legitimacy.

As a final note, a potential line of thought for future studies to follow may assess the Council's legislative resolutions through the prism of customary international law.<sup>199</sup> The reasons are as follows. On the one hand, the characteristics of customary international law may restrain the Council from misusing its powers, as it may deny its ability to globally legislate, in the sense of *instantly* applying certain norms through legislative resolutions. In other words, it entails the non-bindingness of thematic resolutions or general rules

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199. See generally Kristina Daugirdas, *International Organizations and the Creation of Customary International Law*, 31 EUROPEAN JOURNAL OF INTERNATIONAL LAW 201 (2020); cf. *Treaty Action*, *supra* note 28, at 81 ("it is today widely accepted that, in case of conflict, obligations imposed by a binding Security Council resolution *also prevail over customary international law obligations*" (emphasis added)).

or obligations within case-specific “threat to peace” resolutions. The Council’s binding powers, in this regard, will be limited to ad hoc enforcement measures. At the same time, considering Council legislative resolutions as “practice” for the development of custom might enhance its legitimacy. The Council’s legitimacy may also be enhanced due to the recognition embodied in such a proposal of its central role in maintaining international peace and security. Such recognition, in turn, may allow the Council to operate more effectively by enabling it to “lead the way” in the development of custom in the collective security realm.<sup>200</sup>

It is vital to remember, however, that legitimacy is also the result of political or extra-legal discussions among nations, governments, civil society, and academia.<sup>201</sup> As Sir Michael Wood says,

What is needed is a broader consensus on the existing rules of international law on the use of force and on their application, as well as greater support for international institutions, and particularly for a Security Council that is effective and seen to be legitimate. Effectiveness depends upon the political will of the Members of the United Nations. It does not depend upon new rules, or upon Council reform.<sup>202</sup>

All in all, this article does not purport to exhaust the discussion regarding the UN Security Council’s global legislation. Nor can it encompass the entire spectrum of viewpoints, agendas, ideas, and motives concerning the matter. And certainly, the preliminary proposal it sets forth cannot fully remedy, or even address, the entire spectrum of concerns. Is the saga concerning the Council’s global legislation close to an end? This author hopes, with a great sense of humility, that this article offers a starting point for a more thorough and detailed discussion of the matter. Better outcomes will serve both the Council and those who engage with it.

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200. These are, however, non-exhaustive preliminary thoughts that should be the focus of a different yet related study. Indeed, while identifying the Council’s conduct as global legislation is one thing, attributing it to any legal regime is another thing altogether.

201. See generally Buchanan, *supra* note 42; cf. *supra* text accompanying notes 123, 186.

202. See Wood, *supra* note 72, at 366–67.