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The United Nations Security Council's Legislative and Enforcement Powers and Climate Change

Alan Boyle^{*}, *Jacques Hartmann*^{**}, and *Annalisa Savaresi*^{***}

Abstract:

Since the adoption of the 1992 UN Framework Convention on Climate Change (UNFCCC), international climate change law-making has chiefly been the prerogative of the treaty bodies established under the Convention and its Protocol. The adoption of the Paris Agreement in December 2015 is an important step forward for the multilateral climate change framework, but, despite its rapid entry into force, it is still too early to tell whether the Paris Agreement will prove to be an effective and successful intergovernmental framework for tackling climate change. Nor is it necessarily the only relevant institution in the climate change regime. Given the urgency of climate change and the glacial pace of multilateral climate law-making, the idea of exploiting the United Nations Security Council's legislative and enforcement powers to lead global efforts on climate change therefore holds a significant appeal. This chapter focuses on the use of the Council's legislative and enforcement powers to help states get out of the climate change law-making quagmire. Firstly, the chapter analyses the powers and practice of the Council both as a global legislator, and in enforcing states' obligations. Secondly, the chapter considers how existing Council law-making and enforcement powers can be applied to climate change. The chapter concludes by reflecting on advantages and disadvantages of Council's legislative and enforcement action in relation to climate change.

1. Introduction

Since the adoption of the 1992 UN Framework Convention on Climate Change (UNFCCC), international climate change law-making has chiefly been the prerogative of the treaty bodies established under the Convention and its Protocol. While this is hardly unique to the climate regime – and rather is a recurrent feature of multilateral environmental agreements¹ – international climate change law-making is truly remarkable for its latitude, as well as for the limited results it has delivered. Over twenty years the Conference of the Parties (COP) to the UNFCCC, its subsidiary bodies and their homologues under the Kyoto Protocol have adopted hundreds of decisions and established dozens of institutions, which together constitute one of the largest international environmental bureaucracies in existence. Yet, these remarkably intense law- and institution-making activities have made limited progress in achieving the objective of the UNFCCC, namely, the stabilization of greenhouse gas concentrations in the

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¹ As observed e.g. in G Churchill and G Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *The American Journal of International Law* 623; and AE Boyle and CM Chinkin, *The Making of International Law* (Oxford University Press 2007) 151.

atmosphere at a level that would prevent ‘dangerous anthropogenic interference with the climate system.’²

The quest for means to achieve this objective has recently led to the adoption of a new climate treaty, the 2015 Paris Agreement.³ The agreement does not dismantle the pre-existing international climate change law architecture, but rather builds upon it, with the specific aim to further enhance the implementation of the UNFCCC.⁴ The agreement has made some strides in identifying a common goal to reach global peaking of greenhouse gas emissions ‘as soon as possible’ and to keep ‘global temperature increases below 2°C’.⁵ However, the Paris Agreement leaves ample leeway to Parties on how to achieve this goal, largely imposing upon them obligations of conduct, rather than obligations of result.⁶ Furthermore, much of the detail concerning Parties’ obligations remains to be determined by the climate regime’s subsidiary bodies.⁷

In a process that now counts 197 Parties, these law-making activities have historically been difficult.⁸ Given the highly technical nature of the challenge at hand, and the gaping disparity in states’ capacity to rise to the task, it was hardly surprising that it took several years to negotiate rules for the implementation of the Kyoto Protocol. Even when these were agreed, states struggled to ratify the treaty, whose 2012 amendment concerning emission reduction targets for the period between 2013-2020 is yet to enter into force.⁹ Therefore, the challenge is not only to secure the adoption of technical rules enabling the implementation of a treaty, but also to ensure that political will supporting its adoption is not squandered in the process.

At the time of writing it looks like the ratification of the Paris Agreement will be a swift affair, with the world’s largest emitters, China and the US, already on-board.¹⁰ Ensuring that the largely procedural obligations enshrined in the agreement are interpreted and implemented in a way that ensures the achievement of the 2°C goal, however, is likely to be a much greater hurdle. The adoption of the Paris Agreement is in this connection just the beginning of a new and predictably lengthy regulatory phase, whereby Parties will interpret and give content to its broadly worded obligations,¹¹ adjusting the existing institutional framework to best serve a new international climate governance architecture. This task is no mean undertaking in a process operating on the basis of consensus, which typically leads to lowest common denominator outcomes¹² and institutional ‘viscosity’.¹³ Even though

² United Nations Framework Convention on Climate Change, Article 2.

³ Paris Agreement, Paris, 12 December 2015, not yet in force.

⁴ Paris Agreement, Article 2.1. This section draws upon reflections in: A Savaresi ‘The Paris Agreement: Reflections on an International Law Odyssey’ presented at the 12th Annual Conference of the European Society of International Law, ‘How International Law Works in Times of Crisis’ Riga, 8-10 September 2016.

⁵ Paris Agreement, Article 2.1(a).

⁶ Paris Agreement, Article 4.2.

⁷ As detailed in Decision 1/CP.21, Adoption of the Paris Agreement, (UN Doc. FCCC/CP/2015/10, Add.1, 29 January 2016), at 26, 28, 31, 34, 92-95 and 100-102 for the Ad Hoc Working Group on the Paris Agreement; and 29, 34, 37, 39-41, 58, 68, 76-77 and 101 for the Subsidiary Body for Implementation and the Subsidiary Body for Scientific and Technological Advice.

⁸ As suggested also in Boyle and Chinkin (n 1) 159.

⁹ Doha Amendment to the Kyoto Protocol, December 2012, not yet in force.

¹⁰ An up-to-date list of Parties may be accessed at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en>.

¹¹ As suggested also in A Savaresi, ‘The Paris Agreement: A New Beginning?’ (2016) 34 *Journal of Energy and Natural Resources Law* 1.

¹² As suggested in Boyle and Chinkin (n 1) 159.

prolonged law-making is standard practice in the implementation of multilateral environmental agreements, the path ahead for Parties to the climate regime is laden with difficulties, which may well erode the political capital on which the Paris Agreement is built.

Another element that remains to be assessed after the adoption of the Paris Agreement is the role of non-state actors in international climate change governance. Greenhouse gas emissions are largely the product of non-state actors, rather than states. By their very nature, however, international law obligations do not typically target non-state actors, but rather place on states the burden of regulating non-state actors' activities. Neither do non-state actors formally participate in international climate law-making. As under other multilateral environmental agreements (MEAs), non-state actors may attend meetings of the Parties without voting,¹⁴ but cannot formally participate in international law-making. Non-state actors' activities have nevertheless gained increasing visibility in the climate regime in recent years.¹⁵

In the lead up to the adoption of the Paris Agreement, unprecedented initiatives showcased and promoted voluntary emission reductions by companies and subnational governments.¹⁶ The preamble of the Paris Agreement builds upon these initiatives, recognizing for the first time in a climate treaty the importance of engaging 'all levels of government' and 'various actors' in addressing climate change.¹⁷ Furthermore, while the UNFCCC already made generic reference to public participation in addressing climate change and its effects and developing adequate responses,¹⁸ the Paris Agreement specifically emphasizes enhanced public and private sector participation in the implementation of Parties' nationally determined contributions (NDCs).¹⁹ These recent developments largely focus on non-state actors' engagement in the making and implementation of climate change action at the national, rather than at the international level. Yet, implementation of the Paris Agreement may open the door to new avenues for non-state actors' involvement in international climate change governance, for example enabling their participation in the review of implementation of Parties' implementation of their obligations.²⁰ Furthermore, implementation of the Paris Agreement may lead to new ways to monitor and scrutinize non-state actors' transnational activities, building on experience accrued with voluntary initiatives such as that of the UN Global Compact for sustainability.²¹

It is nevertheless too early to tell whether the Paris Agreement will prove to be an effective and successful intergovernmental framework for tackling climate change. Given the urgency of climate change and the glacial pace of multilateral climate law-making, the idea of

¹³ On the notion of viscosity, see DW Drezner, 'The Viscosity of Global Governance: When Is Forum-Shopping Expensive' (2006) <https://www.princeton.edu/~pcglobal/conferences/IPES/papers/drezner_S1100_16.pdf> accessed 11 October 2016.

¹⁴ UNFCCC, Article 7.6 and, Kyoto Protocol, Article 13.8.

¹⁵ See e.g. S Chan et al., 'Reinvigorating International Climate Policy: A Comprehensive Framework for Effective Non-state Action' (2015) 6:4 Global Policy 466; and S Chan et al., 'Strengthening Non-state Climate Action: A Progress Assessment of Commitments Launched at the 2014 UN Climate Summit' (London School of Economics, 2015).

¹⁶ See Lima-Paris Action Agenda and the Non-state Actor Zone for Climate Action (NAZCA) platform, both launched in 2014.

¹⁷ Paris Agreement, Preamble.

¹⁸ UNFCCC, Article 6

¹⁹ Paris Agreement, Article 6.8.

²⁰ As suggested in H van Asselt, 'The Role of Non-State Actors in Reviewing Ambition, Implementation, and Compliance under the Paris Agreement' (2016) 6 Climate Law 91, 96.

²¹ See <<https://www.unglobalcompact.org/what-is-gc>>.

exploiting the United Nations Security Council's (Council) legislative and enforcement powers to lead global efforts on climate change therefore retains its appeal, even after the adoption of the Paris Agreement.²² The attraction of the Council's involvement chiefly lies in its ability to produce quick, universal and immediately binding obligations upon all 193 UN member states.²³ The use of the Council's powers to impose sanctions and the use of force will be discussed in other chapters in this collection.²⁴ This chapter instead focuses on the use of the Council's legislative and enforcement powers to help states get out of the climate change law-making quagmire. Firstly, the chapter analyses the powers and practice of the Council both as a global legislator, and in enforcing states' obligations. Secondly, the chapter considers how existing Council law-making and enforcement powers can be applied to climate change. The chapter concludes by reflecting on advantages and disadvantages of Council's legislative and enforcement action in relation to climate change.

2. International law-making and the Council

International law is made largely on a decentralised basis by disparate lawmakers, which typically attend to this task in an *ad hoc* fashion, addressing matters that require the adoption of internationally coordinated solutions. In this decentralised system different law-making processes may be engaged simultaneously or in competition with each other.²⁵ This complexity can often make it difficult to disentangle the various parts of the law-making process and to ascertain the content of the law. The climate regime is a case in point. Over the years, the sheer complexity of the law-making machinery established to reach the objective of the UNFCCC and assist with its implementation has engendered an almost impenetrable maze of norms, which are remarkably fragmented, not only in their scope, but also in terms of their legal value and force.²⁶

When compared with the limited results delivered by the international climate law-making process, the Council offers unique advantages of speed and universality. The UN Charter entrusts the Council with the primary responsibility for the 'maintenance of international peace and security'²⁷ and all UN member states have agreed 'to accept and carry out' its decisions.²⁸ The Council's decisions are *ex se* legally binding upon UN members, and will prevail over any inconsistent obligations in accordance with Article 103.²⁹

The so-called legislative powers of the Council emanate from Chapter VII of the UN Charter, which enables it to take various forms of non-military or military action where necessary. Pursuant to Article 39 the Council must first determine whether a 'threat to the peace, a

²² See the chapter by S Scott and C Ku in this volume.

²³ Boyle and Chinkin (n 1) 113.

²⁴ See chapters by C Penny and F Sindico, respectively, in this volume.

²⁵ Boyle and Chinkin (n 1) 25.

²⁶ Churchill and Ulfstein (n 1). 635; D French and L Rajamani, 'Climate Change and International Environmental Law: Musings on a Journey to Somewhere' (2013) 25 *Journal of Environmental Law* 437, 445; and H van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Edward Elgar Publishing 2014).

²⁷ UN Charter, Article 24.

²⁸ UN Charter, Article 25.

²⁹ *Lockerbie Cases* (Provisional Measures) 1992 ICJ Reports 114, para 42. See commentary on Article 103 B Simma and others (eds), *The Charter of the United Nations: A Commentary* (Third edition, Oxford University Press 2012) 2209.

breach of the peace, or an act of aggression' exists. This requirement is typically satisfied by a reference in the text of the resolution to a 'threat to the peace,' or a similar formula.³⁰

Whenever threats to the peace exist, the Council has the power to impose obligations on UN member states, in a way that far exceeds the powers of any other international body. In the exercise of this power, the Council has rewritten or dispensed with existing international law and even overridden other law-making processes, acting *de facto* as a global legislator. So even though the Council has no express power to legislate, and it is doubtful whether the drafters of the UN Charter intended it to have such a role,³¹ it has over years passed a number of resolutions creating new law.

Although Council resolutions do not fit within the traditional definition of the sources of international law under Article 38 of the Statute of the International Court of Justice, there is no doubt that states treat resolutions adopted under Chapter VII of the UN Charter as 'normative in their relations with each other.'³² Indeed, some Council resolutions have created far-reaching obligations of a general nature that are binding on all members of the UN.

The capacity of the Council to override treaties and general international law and create new obligations for UN member states without them ratifying new treaties, amending existing treaties, or creating new rules of customary international law must be regarded as a formal legislative capacity.³³ For the purposes of present chapter, the term 'legislative decisions' is therefore used to refer to resolutions that lay down rules of a general nature creating new international obligations and that are binding upon all UN member states.

The practice of the Council provides two prominent examples of such legislative decisions.³⁴ After the events of 11 September 2001 (9/11) the Council passed two unprecedented resolutions on terrorist financing and proliferation of weapons of mass destruction (WMD). Resolution 1373 was adopted less than two weeks after the events of 9/11 and broke new ground by creating far-reaching obligations concerning counter-terrorism, to be implemented both in domestic legal orders as well as in cooperation between states.³⁵ Resolution 1540 was adopted in 2004,³⁶ and was aimed at addressing the specific concern that terrorists might acquire WMD, such as nuclear, chemical and biological weapons.³⁷ A long series of Council resolutions built upon this initial basis to further state obligations concerning counter-terrorism.³⁸ Resolutions 1373 and 1540 are analysed in detail below (sections 3 and 4).

³⁰ Simma and others (eds), *ibid.*

³¹ H Waldock, 'General Course on Public International Law' *Collected Courses of the Hague Academy of International Law*, vol 106 (Brill 1962) 25.

³² R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 18.

³³ Boyle and Chinkin (n 1) 233.

³⁴ Other possible examples of law making resolutions include the establishment of the ad hoc Tribunals for the former Yugoslavia by (Resolution 827 (25 May 1993)) and Rwanda (Resolution 995 (8 November 1994)) as well as the two resolutions which exempted US soldiers from the jurisdiction of the ICC (Resolution 1422 (12 July (2002) and 1487 (12 June 2003)).

³⁵ Security Council Resolutions 1373 (28 September 2001).

³⁶ Security Council Resolution 1540 (28 April 2004).

³⁷ See e.g. A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change (United Nations, 2004) 43, para. 135.

³⁸ Prominent among these are Resolution 1624 (14 September 2005) on the prohibition of incitement to commit terrorist acts and Resolution 2178 (24 September 2014) concerning foreign fighters. For an overview of resolutions, see <<http://www.un.org/en/sc/ctc/resources/res-sc.html>>.

Before moving on to the consideration of these resolutions, it is however necessary to reflect on the limits to the law-making powers of the Council.

2.1.Limits to the Council's powers

The exercise of legislative powers by the Council is potentially problematic.³⁹ Pushed too far, its legislative activities may lose support and lead to challenges to their validity.⁴⁰ Thus the Council's role as a global legislator is tenable only if its use of powers is regarded as a legitimate by most UN member states.⁴¹ In this regard, substantial limits on the Council's powers under Chapter VII are of the essence. Two obvious limitations are suggested by the wording of the Charter itself.

Firstly, Article 24 provides that in carrying out its duties the Council 'shall act in accordance with the Purposes and Principles of the United Nations.'⁴² The purposes and principles are enshrined in Articles 1 and 2 of the UN Charter, respectively, and include the prohibition of the use of force, as well the achievement of international cooperation in solving international problems, and the development of friendly relationship amongst nations. These grounds are, however, rather broad and unlikely to exert constraints on the exercise of the Council's powers under Chapter VII.

The Council has interpreted the concept of 'threat to the peace' with a certain *largesse*.⁴³ Article 39 attributes to the Security Council itself the power to determine 'the existence of any threat to the peace, breach of the peace, or act of aggression'. This provision has been the subject of great scholarly debate,⁴⁴ which broadly interprets it in one of two ways. Some authors suggest that Article 39 merely establishes a procedural obligation, whereas others read it as a substantial requirement. According to the first, the exercise of Chapter VII powers merely requires the Council to determine that a threat to the peace exists and assessment of what constitutes such a threat lies completely within the Council's discretion.⁴⁵ In contrast,

³⁹ See M Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *Leiden Journal of International Law* 593, 593; Daniel H Joyner, 'Non-Proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Council' (2007) 20 *Leiden Journal of International Law* 489, 518.

⁴⁰ See DD Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 *The American Journal of International Law* 552, 552 ; PC Szasz, 'The Security Council Starts Legislating' (2002) 96 *The American Journal of International Law* 901, 901.

⁴¹ On the issue of legitimacy, see Scott and Ku (n 21) 10-12.

⁴² See ICTY, *The Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995, paras 28-29.

⁴³ See e.g. V Gowlland-Debbas, 'The Security Council as Enforcer of Human Rights' in B Fassbender (ed), *Securing Human Rights? Achievements and Challenges of the UN Security Council* (Oxford University Press 2011) 40 and Cortright et al., 'The Sanctions Era : Themes and Trends in UN Security Council Sanctions since 1990', in V. Lowe et al. (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (2007) 205.

⁴⁴ The literature on this issue is copious. See among others TM Franck, 'The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?' (1992) *American Journal of International Law* 519; V Gowlland-Debbas, 'The Relationship Between the International Court of Justice and the Council in the Light of the Lockerbie Case' (1994) *American Journal of International Law* 643; JE Alvarez, 'Judging the Council' (1996) *American Journal of International Law* 1; D Akande, 'The International Court of Justice and the Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 *International and Comparative Law Quarterly* 309.

⁴⁵ See e.g. H Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (The Lawbook Exchange, Ltd 1950) 727; P Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 427; David Schweigman, *The Authority of the Security Council Under Chapter Vii of the Un Charter: Legal Limits and the Role of the International Court of Justice* (Martinus Nijhoff Publishers 2001)

the second group insists that criteria to objectively identify a threat to the peace actually exist, such as, for example, actual fighting on the ground.⁴⁶ In practice, it may be argued, the only real limit to adopting a Chapter VII resolution is that of acquiring the requisite votes.⁴⁷ Yet, several states have noted that resorting to Chapter VII as an umbrella for addressing issues that do not pose a threat to international peace and security must be avoided.⁴⁸

Another limitation may come from *ius cogens*. Some of the Council's resolutions relating to the war in Bosnia, for example, have been challenged on the basis that they facilitated genocide, by denying Bosnia the right to self-defence.⁴⁹ This argument would seem to support the conclusion that Council resolutions cannot authorise torture, genocide, war crimes, or any other activity falling within the narrow category of *ius cogens*.⁵⁰

Whether the Council's exercise of Chapter VII powers generally has to comply with international law has also been the subject of much debate. In his classic work on the UN, Kelsen concludes that the Charter does not provide that in order to be enforceable decisions 'must be in conformity with the law which exists at the time they are adopted.'⁵¹ Controversially, this is the case even in relation to international human rights law. In this regard Cassese observes:

Under the UN Charter system, as complemented by the international standards which have emerged in the last fifty years, respect for human rights and self-determination of peoples, however important and crucial it may be, is never allowed to put peace in jeopardy. One may dislike this state of affairs, but so it is under *lex lata*.⁵²

This approach has been criticised in the literature,⁵³ but not in the practice of international and regional courts and tribunals. Indeed, so far international judicial bodies have tended to treat Chapter VII resolutions as presumptively valid.⁵⁴ The approach by the European Court of Justice in the *Kadi* cases is revealing. While the EU Court of First Instance showed some willingness to review Resolution 1373⁵⁵ in light of *ius cogens* norms, the Grand Chamber went to great lengths to emphasise that it was not reviewing the legality of the said

34; ND White and C Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus Ad Bellum, Jus in Bello and Jus Post Bellum* (Edward Elgar 2013) 124.

⁴⁶ See e.g. A Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2013) 61–62.

⁴⁷ Scott and Ku (n 21) 9.

⁴⁸ President's Summary, High-Level Thematic Debate of the General Assembly 'Maintenance of International Peace and Security' (1 October 2015). In relation to climate change, see Scott and Ku (21) 7–8.

⁴⁹ See Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Preliminary Objections, Judgment) [1996], ICJ Rep 595, especially the Separate Opinion of Judge Lauterpacht.

⁵⁰ A Boyle, 'International Lawmaking: Towards a New Role for the Security Council?' in A Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 183.

⁵¹ H Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (The Lawbook Exchange, 1950) 294–295.

⁵² A Cassese, 'Ex Iniuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *European Journal of International Law* 23, 25.

⁵³ SAG Talmon, 'Council Treaty Action' (2009) 62 *Revue Hellénique de Droit International* 65, 68.

⁵⁴ 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] ICJ Rep 16, para 20; *Prosecutor v. Dusko Tadić* (n 42), para. 29.

⁵⁵ Security Council Resolution 1373 (28 September 2001). Discussed in section 3.1.1.

Resolution.⁵⁶ Instead, the Grand Chamber emphasised that its review only concerned the lawfulness of implementing EU regulations in light of ‘fundamental rights as protected by the Community legal order’.⁵⁷ The European Court of Human Rights has been equally careful, relying on the presumption that ‘the Council does not intend to impose any obligation on member states to breach fundamental principles of human rights.’⁵⁸ Nevertheless, in future the legality of a resolution could well be challenged on the ground that it exceeds the Council’s competence *ratione materiae*, for example, because a specific measure is not seen as a means ‘to maintain or restore’ international peace and security.⁵⁹

Yet, the analysis of practice to date seems to suggest that, in spite of the objections raised in the literature, there seems to be few constraints to the legislative action of the Council, except perhaps from those flowing from the Charter itself. This conclusion seems to be also the most practical: if the Council is bound to act within existing international law, then its power to act could be severely compromised and open to challenge in most, if not all cases. On that basis the Council would find itself constantly embroiled in endless argument about the legality of its decisions, with serious consequences for its effectiveness.⁶⁰ This would deprive the Council of its *raison d’être* as a body that can promptly respond to issues of international peace and security.

3. The Council’s legislative powers in practice

There are several ways in which the Council may lay down rules of a general nature applicable to all UN member states and thus create new international obligations. For the purpose of this chapter, legislative decisions are divided into two typologies. The first concerns the creation of new international obligations without states ratifying treaties or creating new rules of customary international law. This typology may include the extension of obligations embedded in existing international treaties to non-Parties. The second typology concerns the alteration of existing international obligations, such as obligations in treaties or general international law. This might include a broadening of the scope or content of treaty provisions without following established amendment procedures. In practice, the distinction between the creation of new international obligations and alteration existing international obligations is not always clear-cut or useful. For the purposes of the present analysis, however, the distinction is useful as it enables us to distinguish between different types of legislative action that the Council may take, and to reflect on how these may apply in the case of climate change.

3.1. The imposition of new international obligations

Resolutions 1373 and 1540 imposed new obligations on UN member states. Resolution 1373 obliged UN member states to take action to enhance their legal and institutional ability to counter terrorism activities, including by criminalising the financing of terrorism; freezing and denying all forms of financial support to terrorist groups; sharing information and cooperating in the investigation of such acts. In addition, the Council also used its powers

⁵⁶ *Kadi v Council and Commission*, T-315/01 (Judgment of 21 September 2005) para. 226.

⁵⁷ *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P (Judgment of 3 September 2008) paras 221-225 and 283.

⁵⁸ *Al-Jedda v. the United Kingdom*, Appl. no. 27021/08 (Judgement of 7 July 2011) para 102.

⁵⁹ UN Charter, Article 39.

⁶⁰ Boyle (n 53) 185.

under Chapter VII to target named individuals and other non-state entities.⁶¹ It did so by requiring states to impose financial, travel, and arms sanctions on individuals and entities listed by the Al-Qaida/Taliban Sanctions Committee, which had been established in 1999.⁶²

Many of the above-mentioned obligations directly or indirectly concern non-state actors. Yet, as observed also in relation to climate change law, international law obligations do not generally target non-state actors *ex se*, but rather place on states the burden to regulate non-state actors' activities, for instance by freezing their assets or by proscribing new kinds of conduct in domestic law. As the Council has no means to directly enforce its resolutions,⁶³ it has to rely on the cooperation of states and on their implementation of international obligations in domestic law. So even Council-made obligations are not self-executing and do require state implementation. And even though technically it was Resolution 1373 that provided the normative basis for a new counter-terrorism regime, the implementation of this new regime relied upon states to ensure implementation in domestic law.

What is different and special about the counter-terrorism regime established by Resolution 1373 is that earlier international counter-terrorism cooperation was largely the result of obligations that were typically adopted by treaty. Indeed, numerous obligations imposed by Resolution 1373 are modelled on provisions included in a long list of existing counter-terrorism treaties, and most saliently in the 1999 International Convention for the Suppression of the Financing of Terrorist (Financing Convention). Resolution 1373, however, unprecedentedly rendered numerous provisions in the Financing Convention legally binding on all UN member states, at a time when the Convention still needed 18 ratifications to enter into force.⁶⁴ Resolution 1373 merely called on, but did not require, states to become parties to international counter-terrorism instruments 'as soon as possible'. Thus the resolution imposed new obligations upon states, building on the basis of a treaty that had not yet entered into force, and which had only been ratified by four states.

The importance of Resolution 1373 can thus hardly be overestimated. Before 9/11 international counter-terrorism efforts were characterised by the fact that states were free to decide whether to partake or not, by ratifying the relevant treaties. Resolution 1373 *de facto* deprived UN member states of this choice and created a mandatory and virtually universal counter-terrorism regime. Not only was the new regime mandatory, but it also took priority over other treaty obligations, by virtue of Article 103 of the UN Charter. None of the obligations in Resolution 1373 were, moreover, confined to acts related to the events of 9/11. On the contrary, the resolution targeted all acts of 'terrorism' - a concept that was left

⁶¹ The power of the Council to make demands or create obligations for non-state actors was explicitly acknowledged by the ICJ in its Advisory Opinion on Kosovo: see *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, paras. 116-117.

⁶² Following the Taliban regime's refusal to surrender Usama Bin Laden in 1999 the Council passed Resolution 1267, which obliged UN member states to adopt various measures against the Taliban regime, including the freezing of funds. The Al-Qaida/Taliban Sanctions Committee was set up to monitor implementation and was mandated to consider instances of non-compliance, recommend appropriate action and make periodic reports on the impact of the measures imposed. Resolution 1267 (15 October 1999).

⁶³ Pursuant to Article 43 of the UN Charter member states undertake to make armed forces available to the Council, but the provision has never been implemented. Simma and others (n 33) 1351-1356.

⁶⁴ See International Convention for the Suppression of the Financing of Terrorism, Article 23.1. At the time, only four states had ratified: Botswana (8 September 2000); Sri Lanka (8 September 2000); The United Kingdom (7 March 2001); and Uzbekistan (9 July 2001).

undefined - ⁶⁵ and it did so without any express time limitation. In fact, Resolution 1373 is still in force, more than a decade after its adoption.

Despite its extensive scope and far-reaching obligations, Resolution 1373 was passed unanimously without any debate or objections.⁶⁶ As Wood notes, ‘no state has seriously suggested that... [it] was not lawfully adopted’.⁶⁷ While many recognised the innovative character of the resolution, no one seemed concerned that the Council was in effect acting as a global legislator creating new international obligations, without any direct expression of state consent.⁶⁸ Similarly to Resolution 1373, Resolution 1540 also created new obligations for a large number of states. It did so by extending obligations embedded in existing WMD regime to non-parties, and, by altering the obligations of existing Parties, as the next section explains.

3.2. Amendments of treaty obligations

Like Resolution 1373, Resolution 1540 imposes far-reaching obligations on UN member states to enact and enforce a range of measures at the national level, and to co-operate in international efforts. *Inter alia* States must account for and physically protect WMD, develop and maintain border controls and ensure law enforcement. The Non-Proliferation Treaty (NPT),⁶⁹ the Chemical Weapons Convention,⁷⁰ and the Biological and Toxin Weapons Convention⁷¹ do not mention non-state actors. After 9/11, however, it was generally accepted that there was a ‘gap’ in the existing non-proliferation regime.⁷² Resolution 1540 sought to address this gap by prohibiting states from providing support to non-state actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use WMD or their means of delivery.⁷³

Not all obligations established by Resolution 1540 were new.⁷⁴ Like Resolution 1373, it imposes on UN member states obligations already enshrined in existing WMD treaties. Contrary to Resolution 1373, Resolution 1540 amended the obligations of Parties that had already ratified the WMD treaties, which were already in force. But these treaties were not intended to deal with ‘terrorism’ or non-state actors and had in any case not been ratified by

⁶⁵ Resolution 1566 (8 October 2004). It was not before 2004 that the Security adopted some guidance as to what was meant by ‘terrorism’, but the ambiguity remains. For comments, see A Bianchi, ‘Council’s Anti-Terror Resolutions and Their Implementation by Member states: An Overview’ (2006) 4 *Journal of International Criminal Justice* 1044, 1050–1051.

⁶⁶ Turkey, for instance, referred to it as ‘ground-breaking’; Singapore greeted it as ‘landmark decision’; the United Kingdom welcomed it as a ‘historic event’, UN Doc. S/PV.4413 (12 November 2001).

⁶⁷ M Wood, ‘Hersch Lauterpacht Memorial Lectures: The UN Security Council and International Law - Lecture 1’ (Lauterpacht Centre for International Law, 7 November 2006) 8.

⁶⁸ On the importance of consent in international law-making, see Boyle and Chinkin (n 1) 25.

⁶⁹ The 1968 Treaty on the Non-Proliferation of Nuclear Weapons.

⁷⁰ The 1993 Chemical Weapons Convention.

⁷¹ The 1972 Biological and Toxin Weapons Convention.

⁷² See debate in the Council on non-proliferation of weapons of mass destruction UN Doc. S/PV.4950 (22 April 2004).

⁷³ Report of the Committee established pursuant to Resolution 1540 (28 April 2004), UN Doc. S/2006/257, para. 1.

⁷⁴ Cf. M Asada, ‘Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation’ (2008) 13 *Journal of Conflict and Security Law* 303.

many states.⁷⁵ In adopting Resolution 1540 the Council filled a gap in the law,⁷⁶ expanded the reach of existing treaties and imposed new obligations on states that had not ratified WMD treaties. The Resolution thus created the first comprehensive regime on WMD.

While Resolution 1540 states that none of the obligations set forth is to be interpreted ‘so as to conflict with or alter the rights and obligations’ of state Parties to the WMD treaties, it unequivocally imposes new obligations and considerably amends the scope of existing ones. Indeed, Resolution 1540 altered international law, both by expanding the obligations of Parties to WMD treaties and by creating new obligations for states that had elected not to ratify these treaties.⁷⁷ For these reasons, Resolution 1540 has been described as somewhat like an ‘amendment’ to the NPT.⁷⁸

Unlike its predecessor, Resolution 1540 was not adopted in response to a specific incident or situation, but rather as a response to a generally perceived threat.⁷⁹ Like Resolution 1373, however, the measures imposed were of a general nature, universal in scope and of unlimited duration. And like its predecessor, Resolution 1540 is still in force, more than a decade after its adoption.

Resolution 1540, nevertheless, did not enjoy the same warm reception as Resolution 1373. India, for example, stated that it would ‘not accept any interpretation of the draft resolution that imposes obligations arising from treaties that India has not signed or ratified, consistent with the fundamental principles of international law and the law of treaties.’⁸⁰ Several states highlighted that the Council did not have any competence to act as a global legislator.⁸¹ Some expressed concern that the resolution would impose new obligations, without any direct expression of consent from non-Council member states.⁸² Others worried that the resolution would authorise sanctions or other forms of coercion against states that did not adequately comply.⁸³ These concerns did not prevent the unanimous adoption of Resolution 1540.⁸⁴ Its lack of perceived legitimacy, nevertheless, has affected implementation, which has been described as ‘patchy and somewhat controversial’⁸⁵ and thus provides important lessons concerning the potential to use the Council’s powers in relation to climate change.

⁷⁵ Joyner, ‘Non-Proliferation Law and the United Nations System’ (n 30) 508.

⁷⁶ Asada (n 78) 305; E Rosand, ‘The Council as Global Legislator: Ultra Vires or Ultra Innovative’ (2004) 28 *Fordham International Law Journal* 542, 551.

⁷⁷ G Bunn, ‘The Nuclear Nonproliferation Regime and Its History’ in G Bunn, CF Chyba and WJ Perry (eds), *U.S. Nuclear Weapons Policy: Confronting Today’s Threats* (Brookings Institution Press 2006) 86.

⁷⁸ *ibid.*

⁷⁹ Although it is often linked with the revelation that the Pakistani scientist Abdul Qadeer Khan had been selling nuclear secrets. D Joyner, ‘Nuclear Non-Proliferation and the UN Security Council in a Multipolar World’ in M Happold (ed), *International Law in a Multipolar World* (Routledge 2013) 45.

⁸⁰ UN Doc. S/PV.4950 (22 April 2004) 24.

⁸¹ See statements by Pakistan, Algeria, Indonesia, and Iran. For opposite views, see statements by Spain, Switzerland and Angola, *ibid.*

⁸² Asada (n 64) 316.

⁸³ See statements by Algeria, Philippines, Switzerland, Japan, Peru, Cuba, Indonesia and Iran, *ibid.*

⁸⁴ Singapore’s representative probably captured the atmosphere in the Council, when he said that he understood ‘many of the concerns expressed’ and would have preferred ‘a multilateral treaty regime’, emphasising that ‘multilateral negotiations could take years, and time is not on our side.’ *ibid.*

⁸⁵ S Lodgaard and B Maerli, *Nuclear Proliferation and International Security* (Routledge 2007) 279.

4. The Council's enforcement powers in practice

The UN Charter gives the Council the authority to establish such subsidiary bodies as it deems necessary for the performance of its functions.⁸⁶ The establishment of subsidiary bodies, such as committees, panel of experts or monitoring groups typically comprising representatives from all 15 Council members and operating on the basis of consensus, is not uncommon. Over the years the Council has established a variety of so-called 'enforcement bodies'⁸⁷ and all UN sanctions regimes are assisted by one or more of such bodies.⁸⁸ The primary task of subsidiary bodies is to assist in the implementation and enforcement of resolutions, which in turn results in UN member states' obligation to accept and execute decisions that these bodies take.⁸⁹ Resolutions 1373 and 1540 are assisted by dedicated enforcement bodies tasked with the review of implementation of state obligations, as well of the effectiveness of resolutions themselves. Therefore, although measures envisioned in Resolutions 1373 and 1540 ultimately target non-state actors, the onus of implementing these obligations rests on states. Accordingly, enforcement measures also focus on states, as this section further explains.

4.1. Resolution 1373

The implementation of Resolution 1373 was assisted by an intrusive monitoring system, composed of the Counter-terrorism Committee (CTC) and the Counter-Terrorism Committee Executive Directorate (CTED).⁹⁰ The CTC was modelled on the country-specific sanctions committees that the Council had established in previous years. The committee was originally mandated to monitor the implementation of Resolution 1373. Its mandate was later extended to include the facilitation of technical assistance to states and working with international, regional, and sub-regional organisations, and the promotion of best practices in the areas covered by Resolution 1373.⁹¹ The CTED was established in 2004 to assist the CTC and represented a clear innovation in the practice of the Council's enforcement bodies.⁹² It performs a variety of functions, including expert assessment of the implementation of the Resolution in domestic legislation, and facilitating counter-terrorism technical assistance to individual countries, for instance by means of country visits.

In the first instance, the CTC required UN member states to enact laws to combat terrorism.⁹³ Accordingly, states must have legislation in place covering 'all aspects of Resolution 1373' as well as a process for ratifying 'as soon as possible' international conventions and protocol

⁸⁶ UN Charter, Article 29.

⁸⁷ Other examples of the establishment subsidiary bodies of the Council are the two international criminal tribunals for the Former Yugoslavia (Resolution 827, 25 May 1993) and Rwanda (Resolution 955, 8 November 1994).

⁸⁸ This includes committees for Somalia (Resolution 751, 24 April 1992), Iraq (Resolution 1518, 24 November 2003), The Democratic Republic of the Congo (Resolution 1533, 12 March 2004) and North Korea (Resolution 1718, 14 October 2006). See Security Council Report, Special Research Report: UN Sanctions (25 November 2013) 7. Available at: <<http://www.securitycouncilreport.org/>>.

⁸⁹ Simma and others (n 33) 1929.

⁹⁰ The CTED was established by Resolution 1535 (26 March 2004). See generally, E Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism' (2003) *American Journal of International Law* 333.

⁹¹ Resolution 1377 (12 November 2001).

⁹² Security Council Resolution 1536 (26 March 2004).

⁹³ See 'stage A', Work programme of the Counter-Terrorism Committee (28 September - 31 December 2002), UN Doc. S/2002/1075 (25 September 2002) 3.

relating to terrorism.⁹⁴ These obligations have arguably made accession to international counter-terrorism instruments mandatory, which might explain the sudden surge in ratifications after 2001.⁹⁵

In the second instance, the CTC asked states to enforce the legislation they had adopted, including the monitoring of police and intelligence structures, customs, immigration and border controls.⁹⁶ Finally, states were required to partake in bilateral, regional and international cooperation, such as the exchange of information or judicial cooperation.⁹⁷

The work of the CTC and CTED is similar to that of other UN bodies, such as those monitoring the implementation of the international human rights treaties. Both sets of bodies review reports submitted by UN member states and provide technical assistance to member states to enhance their capacity to implement their international obligations, among others by developing tools, such as general comments under the human rights regime, or technical guides or best practices under the counter-terrorism regime. But whereas human bodies generally publicise their observations over state reports, the CTC and CTED are more discrete in their approach.⁹⁸ Another fundamental difference is that reporting obligations in human right instruments have a specific treaty basis, whereas reporting obligations under the counter-terrorism regime were read into Resolution 1373.⁹⁹

The results achieved by the enforcement bodies established under Resolution 1373 in strengthening global counter-terrorism capacity are mixed.¹⁰⁰ In terms of norm setting, the results are impressive. Before the adoption of Resolution 1373 only Botswana and the United Kingdom had ratified all twelve international counter-terrorism instruments that had been negotiated in the previous forty years. Within two years, that number had risen to 40 and today most count more than 180 Parties.¹⁰¹

Also in relation to reporting, the initial results were impressive. By 2003 virtually all UN member states had submitted their first report to the CTC.¹⁰² However, states have since shown signs of reporting fatigue and increasingly failed to comply with their reporting obligations.¹⁰³ Lack of compliance could in theory be sanctioned through authorisation of measures, such as economic sanctions, or even the use of force, but these drastic consequences have never been applied. While the Council initially announced that it would

⁹⁴ *ibid.*

⁹⁵ See Global Survey of the Implementation of Security Council Resolution 1373 (2001) by Member states, UN Doc. S/2011/463 (2011) 71. See also Resolution 1566 (2004), which called upon all states to become party, as a matter of urgency, to the relevant international conventions and protocols.

⁹⁶ See 'stage B', Work programme of the Counter-Terrorism Committee (1 January-31 March 2003), UN Doc. S/2003/72 (17 January 2003) 3.

⁹⁷ Report by the Chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council Resolution 1373 (2001), UN Doc. S/2004/70 (26 January 2004) 10-11.

⁹⁸ The reports are available at: <<http://www.un.org/en/sc/ctc/resources/1373.html>>.

⁹⁹ See 'stage A', Work programme of the Counter-Terrorism Committee (n 91) 3.

¹⁰⁰ Cf. D Cortright and others, 'Global Cooperation Against Terrorism: Evaluating the United Nations Counter-Terrorism Committee' in D Cortright and GA Lopez (eds), *Uniting Against Terror: Cooperative Nonmilitary Responses to the Global Terrorist Threat* (MIT Press 2007) 24-30.

¹⁰¹ See: <http://www.un.org/en/sc/ctc/laws.html>

¹⁰² See statement by the Chairman of the CTC to the Security Council, UN Doc. UN Doc. S//PV.4688 (20 January 2003) 3 and UN Doc. S//PV.4734 (4 April 2003). The three states were Sao Tome and Principe, Swaziland and Vanuatu.

¹⁰³ Work programme of the Counter-Terrorism Committee (1 October-31 December 2005), UN Doc. S/2005/663 (21 October 2005) 3.

‘consider what action is needed to address failures to meet the requirements of Resolution 1373’¹⁰⁴ so far it has limited itself to naming-and-shaming states failing to comply with their reporting obligations.¹⁰⁵ This lack of reaction by the Council’s enforcement bodies is also to be viewed in light of the fact that, in spite of dwindling reporting, most states have taken steps to criminalise terrorist acts in their domestic laws and regulations, pursuant to their obligations.¹⁰⁶

4.1.Resolution 1540

Like the CTC, the 1540 Committee¹⁰⁷ was tasked with monitoring implementation and to coordinate technical assistance for the implementation of Resolution 1540, among others, by facilitating expert assistance and organising country visits upon states’ request.¹⁰⁸ The Committee is composed of representatives from all Council members, which are supported by the UN Department of Political Affairs and the UN office of Disarmament Affairs. Initially, the Committee was established for a period of two years, but its mandate has subsequently been extended several times, most recently until 2021.¹⁰⁹

The 1540 Committee reviews UN member states’ reports on steps taken to implement Resolution 1540. The Committee has strengthened global non-proliferation and counter-terrorism regimes, supporting cooperation between international organisations, as well as and regional organisations. In 2015, the Committee completed its revision of the record of implementation measures of all UN member states.¹¹⁰ Although the results were less impressive than those under Resolution 1373, the review revealed that states had generally complied with their pervasive reporting requirements under the resolution.¹¹¹

The 1540 Committee has met challenges similar to those faced by the CTC, including a steady decline in state reporting, partly because of reporting fatigue.¹¹² As of 2015, 17 states had yet to submit their first report.¹¹³ Like the CTC, the 1540 Committee is theoretically endowed with powers to redress instances of non-compliance with states’ reporting obligations. Still, so far the Committee has never adopted sanctions in cases of non-compliance. Instead, and similar to the CTC, the 1540 Committee has taken a non-confrontational approach, engaging in various outreach activities to promote the full

¹⁰⁴ See statement by the Chairman of the CTC to the Security Council, UN Doc. S/PV.4512 (15 April 2002).

¹⁰⁵ Cf. Work programme of the Counter-Terrorism Committee (1 July-30 September 2005), UN Doc. S/2005/421 (29 June 2005). See also E Rosand, A Millar and J Ipe, ‘The UN Council’s Counterterrorism Program: What Lies Ahead?’ International Peace Academy (October 2007) 10.

¹⁰⁶ See Global Survey of the Implementation of Security Council Resolution 1373 (2001) (n 95) 14.

¹⁰⁷ Security Council Resolution 1540 (28 April 2004).

¹⁰⁸ The 1540 Committee itself does not provide assistance but has a clearinghouse role to facilitate assistance.

¹⁰⁹ Resolutions 1673 (27 April 2006); 1810 (25 April 2008); 1977 (20 April 2011).

¹¹⁰ Briefing by the Chair of the Council Committee established pursuant to Resolution 1540 (22 December 2015).

¹¹¹ In 2011, the Council called upon all states that have not yet done so to submit a first report to the Committee without delay. As of December 2015, a total of 176 out 193 members have submitted national implementation reports. Review of the implementation of resolution 1540 (2004) for 2015, UN Doc. S/2015/1052 (30 December 2015).

¹¹² E Rosand, A Millar and J Ipe, ‘The UN Security Council’s Counterterrorism Program: What Lies Ahead?’ (International Peace Academy 2007) 5.

¹¹³ Review of the implementation of resolution 1540 (2004) for 2015 UN Doc. S/2015/1052 (30 December 2015).

implementation of Resolution 1540, and assuming a facilitative role for sharing experiences and lessons learned, capacity building and technical assistance.

4.2. Interim conclusion on Council's practice to date

Resolutions 1373 and 1540 show that the Council may take legislative decisions on matters within its mandate to maintain international peace and security. The question is, however, what the significance of these resolutions as a precedent is. Resolution 1373 may be regarded as somewhat exceptional, because of the circumstances that led to its adoption in an atmosphere of general consensus on the need to address what was perceived to be an unprecedented threat to security. The same cannot be said of Resolution 1540.¹¹⁴ The decreased sense of emergency that characterised the latter resolution may explain some states' reluctance to fully comply with it. In other words, implementation of Resolution 1540 seems to support the conclusion that the exercise of the Council's legislative powers is only tenable if it is regarded as legitimate by most if not all UN member states.

The Council's monitoring of the implementation of Resolutions 1373 and 1540 has had some notable successes. For example, the CTC has conducted what amounts to the first worldwide audit of counter-terrorism capacities, based on the hundreds of reports submitted since 2001.¹¹⁵

Although it is difficult to determine what role the enforcement mechanisms have played, it is a fact that since the adoption of the above-mentioned resolutions many states have taken steps to revise existing or adopt new laws and generally enhance compliance with the global counter-terrorism and non-proliferation regimes established by the Council. This is despite that fact that the Council and its enforcement bodies have been somewhat cautious in the exercise of enforcement powers, focusing their efforts on non-coercive measures, such as capacity building and promoting the development and dissemination of best practices. But while enforcement bodies have been quite successful in securing the adoption of domestic legislation, they have not been as successful in ensuring its implementation. As confirmed by the CTC itself, many states have ratified international counter-terrorism treaties and subsequently failed to adopt adequate enforcement measures, leaving such ratifications with little practical effect.¹¹⁶

While some states have made progress in combating terrorist financing, overall efforts have been described as 'uneven'.¹¹⁷ Some have even called the global campaign aimed at freezing terrorists' funds 'a dismal failure'.¹¹⁸ In some regions, implementation has been influenced by changes in national priorities.¹¹⁹ As noted by South Africa's representative, the Council 'should acknowledge that the 1540 reporting requirements themselves were overly

¹¹⁴ See address to the UN General Assembly, 7th plenary meeting, UN Doc. A/58/PV.7 (23 September 2003) 11.

¹¹⁵ Rosand, Millar and Ipe (n 115) 8.

¹¹⁶ Ninth Report by the Chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council Resolution 1373 (2001), UN Doc. S/2004/70 (26 January 2004) 6-7.

¹¹⁷ M Jakobsen, 'Combating Terrorist Financing in Europe: Gradual Progress', *Policy Watch/Peace Watch*, (26 March 2007).

¹¹⁸ P Williams, 'Warning Indicators and Terrorism Financing', in *Terrorism Financing and state Responses*, ed. by JK Giraldo and HA Trinkunas (2007) 73.

¹¹⁹ S Monblatt, 'Terrorism and Drugs in the Americas: The OAS Response', *Americas Forum: Department of Communications and External Relations*, IV (March 2004).

complicated and not suitable for many developing states'.¹²⁰ Few African states have been willing to devote resources to combating the financing of terrorism.¹²¹ In addition, many states have progressively become reluctant to comply with their reporting obligations, and there is a great deal of variation in the quality and quantity of reporting. Rosand *et al.* argue that the Committee's reluctance to ensure enforcement may stem from the UN members' general hesitancy to single out other states, and the consensus-based practice under which the UN Committees normally operate.¹²²

The lack of enforcement to some extent illustrates the Council's impotence. As an institution without enforcement powers of its own, the Council has to work through states. While in theory the Council can order states to take specific action - for instance by enhancing their legal and institutional abilities or by criminalising certain forms of conduct - States are reluctant to resort to coercive powers in their relations. This section has clearly shown that this has been the case even in the context of the Council's powers under Chapter VII.

It therefore seems possible to conclude that perceived legitimacy is a *condicio sine qua non* for state action through the Council.¹²³ This has been a crucial element in the reduced 'compliance pull' of Resolutions 1373 and 1540 over time.¹²⁴ Even in cases where the Council has exercised its legislative and enforcement powers, the Council has not resorted to coercive measures and rather relied upon a 'managerial' approach to compliance.¹²⁵

5. Applying the Council's legislative and enforcement powers to climate change

While so far the exercise of legislative and enforcement powers has mainly been limited to counter-terrorism,¹²⁶ the Council's interpretation of a threat to international peace and security is open-ended and may well include climate change or its impacts.¹²⁷ Not unlike the proliferation of WMD, climate change poses threats to peace and security which may seem less imminent, but which are potentially catastrophic. So far the Council's debate on climate change as a threat to international peace and security has been inconclusive. Yet, the Council has already asserted that some of the predicted impacts of climate change, like mass migration,¹²⁸ or the outbreak of disease,¹²⁹ constitute a threat to international peace and security. At the same time, the Council has not used its powers to address more recent incidents of mass migration, such as that in Syria, ostensibly for lack of supporting political will.

It is nevertheless clear that some of the impacts of climate change may be regarded as threats to international peace and security which may benefit from the Council's intervention. On the

¹²⁰ Non-proliferation of weapons of mass destruction, UN Doc. S/PV.5635 (23 February).

¹²¹ See generally W Okumu and A Botha (eds.), *Understanding Terrorism in Africa Building Bridges and Overcoming the Gaps* (2008).

¹²² Rosand, Millar and Ipe (n 115) 10.

¹²³ As also observed by Scott and Ku (n 21) 11.

¹²⁴ TM Franck, *The Power of Legitimacy among Nations* (Oxford University Press 1990) 16.

¹²⁵ D Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2011) 236.

¹²⁶ See n 34 and corresponding text.

¹²⁷ Cf. Scott and Ku (n 21).

¹²⁸ Security Council Resolution 688 (5 April 1991) on the repression of the Iraqi population resulting in a flow of refugees.

¹²⁹ Security Council Resolution 2177 (18 September 2014), in relation to the Ebola virus.

one hand, the Council could be involved in the implementation and/or in the enforcement of existing international climate change law. On the other, the Council could exercise its Chapter VII powers to undertake legislative and enforcement initiatives that complement those undertaken under the climate regime. Indeed, during negotiations of the Paris Agreement the need to build synergies with other international law and policy forums whose mandate overlaps with that of the climate regime was repeatedly flagged. The Paris Agreement has broken new ground by tracing explicit links between the climate change and the human rights regimes,¹³⁰ whereas its accompanying COP decision explicitly acknowledges the importance of liaising with other international processes on matters such as climate finance¹³¹ and human displacement.¹³² In this vein, the exercise of the Council's legislative and enforcement powers would not sideline international law-making and enforcement under the climate regime. On the contrary, the Council could work in parallel with the climate regime, and support and supplement its implementation and effectiveness.¹³³ This section explores the exercise of the Council's powers under Chapter VII in relation to climate change, distinguishing between enforcement and legislative powers.

5.1. Legislative powers

As seen in section 3, the Council may exercise its legislative powers in relation to climate change, both to impose new obligations upon all UN member states, and to amend existing treaty obligations. In theory, the Council could also initiate from scratch law-making activities on climate change, regardless of state obligations that are embedded in existing international climate change law. The practice of legislative decisions on counter-terrorism however shows that the Council has relied on existing treaty law, rather than engaging in a law-making process geared towards designing *ex novo* international law obligations. Even setting aside the fact that there is no precedent for this in the practice, it would be hard for the Council to engage in such technical law-making activities. International law-making on climate change heavily relies on technical input and on the work of the international bureaucracy established under the climate regime.¹³⁴ This bureaucracy could be put to the service of the Council, but its technical times and *modus operandi* would scarcely fit with those of the Council, and likely frustrate the purpose to resort to it in the first place. This section will therefore only consider action by the Council that fits within the existing practice of legislative resolutions. Firstly, it will consider the imposition of new obligations on UN member states on the basis of a treaty that has not yet entered into force. Secondly, it will analyse the amendment of obligations of parties and the imposition of new obligations on non-parties to treaties that are already in force.

5.1.1. The imposition of new obligations

Following the precedent of Resolution 1373, the Council could exercise its legislative powers to create new obligations.

¹³⁰ Paris Agreement, Preamble.

¹³¹ Decision 1/CP.21, at 44.

¹³² Decision 1/CP.21, at 50.

¹³³ SV Scott, 'Implications of Climate Change for the UN Security Council: Mapping the Range of Potential Policy Responses' (2015) 91 *International Affairs* 1317, 1318.

¹³⁴ M Grubb, 'Full Legal Compliance with the Kyoto Protocol's First Commitment Period – Some Lessons' [2016] *Climate Policy* 1.

First, the Council could require UN member states to ratify the Paris Agreement. Not all States have yet done so, and some may prove reluctant. Like the counter-terrorism regime, the climate regime requires near universal adherence to be effective.¹³⁵ The legislative resolutions analysed in section 3 obtained remarkable results by imposing the ratification of existing international counter-terrorism treaties on all UN member states.¹³⁶ The Council could similarly act to avert the lengthy ratification process that plagued the Kyoto Protocol and its Doha Amendment. It is nevertheless questionable whether the Council should interfere with the entry into force of a treaty that has only recently been adopted. Even though Resolution 1373 was adopted shortly after 9/11, and less than a year after the Financing Convention was opened for signature, this happened in rather exceptional circumstances. Unlike the Kyoto Protocol and the Doha Amendment, the Paris Agreement has a much lower ratification threshold.¹³⁷ The Paris Agreement entered into force in November 2016 at what has been described as ‘record-breaking’ speed, even though the rule-book for its implementation is yet to be written.¹³⁸ It would therefore seem undesirable to disrupt the delicate consensus building exercise that led to the adoption of the Paris Agreement, especially at a time when the elaboration of rules concerning its implementation remains ongoing.

Another, more intriguing, use of the Council’s powers to engage with states’ adherence to the Paris Agreement would be to force individual states not to withdraw from it, once they have ratified. The Council could for example undertake action to force recalcitrant states to abide to their treaty obligation under the climate regime, in spite of withdrawal according to the procedures enshrined in the treaties. Canada notoriously withdrew from the Kyoto Protocol, before it could be found to be in non-compliance with its obligations.¹³⁹ The Council could act to prevent the recurrence of incidents such as this. This has happened at least once, when the Council demanded that North Korea retract its statement of withdrawal from the NPT, even though the country had a perfectly legitimate right to withdraw under that treaty.¹⁴⁰

Finally, the Council legislative powers could be used to specifically target climate change impacts, such as climate-change related disasters and humanitarian emergencies, including epidemics, food and water shortages and the displacement of people. Organised migration and planned relocation of populations forced to move as a result of climate change have long been an elephant in the room at climate negotiations.¹⁴¹ The Paris Agreement does not

¹³⁵ S Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods* (1st edn, Oxford University Press 2007).

¹³⁶ See Global Survey of the Implementation of Security Council Resolution 1373 (2001) (n 95) 6.

¹³⁷ The entry into force of the Paris Agreement is subjected to ratification by at least 55 Parties to the UNFCCC, accounting at least for 55 per cent of *global* greenhouse gas emissions: Paris Agreement, Article 21.1. By comparison, the Kyoto Protocol entered into force only when it was ratified by 55 Parties to the UNFCCC, accounting at least for 55 per cent of *developed countries’* emissions: Kyoto Protocol, Article 25.1. Before entering into force, the Doha Amendment to the Kyoto Protocol needs to be ratified by 90 Parties to the Kyoto Protocol: Kyoto Protocol, Article 20.5.

¹³⁸ C Voigt, ‘On the Paris Agreement’s Imminent Entry Into Force’ <<http://www.ejiltalk.org/on-the-paris-agreements-imminent-entry-into-force/>> accessed 11 October 2016.

¹³⁹ JM Glenn and J Otero, ‘Canada and the Kyoto Protocol: An Aesop Fable’ in Erkki J Hollo, Kati Kulovesi and Michael Mehling (eds), *Climate Change and the Law* (Springer Netherlands 2013).

¹⁴⁰ Security Council Resolution 1718 (14 October 2006) and Security Council Resolution 1874 (12 June 2009). For comments, see D Joyner, ‘The Council as a Legal Hegemon’ (2012) 43 *Georgetown Journal of International Law* 225, 248–251.

¹⁴¹ MK Solomon and K Warner, ‘Protection of Persons Displaced as a Result of Climate Change’, *Threatened Island Nations* (Cambridge University Press 2013).

directly address human displacement associated with climate change. Yet, a process to develop recommendations for approaches to avert, minimise and address this matter has been recently established,¹⁴² with existing institutions tasked to facilitate efforts towards the development and implementation of comprehensive climate risk management strategies.¹⁴³

While at the time of writing it is too early to tell whether these initiatives will suffice to address the tantalizing task of addressing human displacement associated with climate change, it seems fair to assume that the related law-making process will require considerable time. In this connection, there could be scope for using the legislative powers of the Security Council to support inter-state cooperation. The Council's legislative powers could be used to catalyse action, by imposing upon states to cooperate in the face of massive humanitarian and environmental emergencies associated with both rapid and slow onset climate change events. For example the Council could force recalcitrant states to take action and/or to cooperate with others, through the provision of finance or other resources, or by accepting to take in other states' citizens that have been displaced by climate change. While these contributions would go a long way in addressing gaps and limitations in obligations in the climate regime, the recent case of Syria provides eloquent evidence of the fact that states may lack the political will to use the powers of the Council in this way.

5.1.1. Amendments of treaty obligations

As seen with Resolution 1540, the Council can broaden the scope of existing climate treaties, by filling 'gaps' in the law or extending the scope of state obligations. The use of the Council's powers could present some advantages. The procedure for amendments to the climate treaties is rather lengthy and requires three-fourths majority.¹⁴⁴ The Council could bypass the hurdles imposed by this procedure, in effect amending the treaties and creating new obligations for all UN member states. The exercise of the legislative powers of the Council could be targeted at particularly divisive issues, such as amendments to the lists of Parties in the Convention's Annexes. These lists identify which countries are to be considered as developed for the purposes of the Convention, with important implications for state obligations.¹⁴⁵ While the Paris Agreement has considerably levelled state obligations when compared with earlier climate treaties, it still hinges on the principle of common but differentiated responsibilities,¹⁴⁶ and the degree of differentiation remains to be determined in the context of future law-making activities. In this connection, it is possible that the party categories identified in the Annexes of the UNFCCC may be of continued relevance,¹⁴⁷ and require amendment in ways that are more expeditious than those contemplated in the UNFCCC. Nevertheless, some of the Council's permanent members, China and the Russian Federation, have historically been reluctant to engage in a re-visitation of the Convention's Annexes. The exercise of Council legislative powers on this issue therefore seems highly unlikely.

¹⁴² Decision 1/CP.21, at 50.

¹⁴³ Decision 1/CP.21, at 49.

¹⁴⁴ See Paris Agreement, Article 21 and United Nations Framework Convention on Climate Change, Article 15.

¹⁴⁵ UNFCCC, Annexes I and II.

¹⁴⁶ Paris Agreement Preamble and Articles 2.2 and 4.4.

¹⁴⁷ As suggested also in: A Savaresi, 'The Paris Agreement: A Rejoinder' <<http://www.ejiltalk.org/the-paris-agreement-a-rejoinder/>> accessed 20 April 2016.

5.2. Enforcement powers

Section 4 has shown that the use of enforcement powers in relation to counter-terrorism has largely been geared towards facilitating compliance with the Council's resolutions and the obligations they impose upon UN member states. In this context the Council's subsidiary bodies have performed a managerial, rather than an enforcement role, reviewing reports on UN member states' activities and providing advice on how these may be strengthened, rather than adopting enforcement measures, such as sanctions.

Contrary to the counter-terrorism regime, the climate regime is already well equipped with tools to enable what has aptly been described as 'implementation, compliance and effectiveness review.'¹⁴⁸ International climate change law already establishes reporting obligations, both in relation to Parties' emissions and action undertaken to address these. Parties' obligations in this connection have become increasingly sophisticated and pervasive over time. The UNFCCC and the Kyoto Protocol established separate but overlapping systems to review the implementation of state obligations. The Protocol is furthermore endowed with a compliance mechanism. The Kyoto Protocol Compliance Committee is entrusted, inter alia, with reviewing compliance by developed countries' with emission reductions obligations.¹⁴⁹ It may even penalise non-compliance, which is unusual by the standards of most MEAs.¹⁵⁰ The Kyoto Protocol Compliance Committee has performed remarkably well,¹⁵¹ raising uncomfortable questions about the adequacy of the overall international environmental governance architecture to provide actual solutions to climate change.

More generally, the implementation of review arrangements under the UNFCCC and the Kyoto Protocol has evidenced a series of shortcomings.¹⁵² First, the lack of a standard template to report mitigation action under the Convention hindered comparison between Parties' efforts. Second, the review process does not provide means to 'ratchet up' ambition over time. Third, developing countries have struggled to comply with their increased reporting obligations,¹⁵³ thus drawing attention to the need for dedicated assistance and capacity building.

The Paris Agreement builds upon and expands existing review arrangements under the UNFCCC, potentially addressing these shortcomings. The agreement imposes upon all Parties the obligation to prepare, communicate and maintain successive NDCs and to pursue mitigation activities at the national level.¹⁵⁴ These obligations of conduct whereby each Party is required to submit information on how they intend to reduce their emissions, and by how

¹⁴⁸ *Ibid.* 242.

¹⁴⁹ Kyoto Protocol, Annex B.

¹⁵⁰ As argued for example in M Doelle, 'Compliance and Enforcement in the Climate Change Regime' in E Hollo, K Kulovesi and M Mehling (eds), *Climate Change and the Law* (Springer 2012); R Lefebvre and S Oberthür, 'Key Features of the Kyoto Protocol's Compliance System', *Promoting Compliance in an Evolving Climate Regime* (Cambridge University Press 2011).

¹⁵¹ Grubb (n 137).

¹⁵² As noted for example in J Ellis and S Moarif, 'Identifying and Addressing Gaps in the UNFCCC Reporting Framework' (OECD 2015) <<http://www.oecd.org/environment/cc/Identifying-and-addressing-gaps.pdf>> accessed 14 September 2016.

¹⁵³ As of January 2016, only 24 developing country Parties had submitted their biennial update reports, whereas all developed countries Parties have submitted their biennial reports.

¹⁵⁴ Paris Agreement, Articles 3 and 4.2.

much, are largely procedural in nature.¹⁵⁵ While no format for (intended) NDCs could be agreed ahead of the adoption of the Paris Agreement, the conference of the Parties serving as the meeting of the Parties is expected to adopt specific guidance on this issue.¹⁵⁶ A Capacity-building Initiative for Transparency is furthermore expected to support developing countries in meeting their enhanced reporting obligations.¹⁵⁷

Innovatively, the Paris Agreement has also established the premises for the periodic review of Parties' efforts, both at the individual¹⁵⁸ and at the aggregate level,¹⁵⁹ which will build on and supersede extant arrangements.¹⁶⁰ The relationship between this review process and the 'expert-based' 'facilitative' 'non-adversarial' and 'non-punitive' compliance mechanism envisioned by the Paris Agreement remains to be ascertained.¹⁶¹ Even though the details of this compliance mechanism are yet to be determined, it seems clear that it will follow a managerial, rather than an enforcement approach. In other words, as under other MEAs, the Paris Agreement's compliance committee will not so much coerce, but rather encourage compliance, enabling Parties' consultation, cooperation and peer pressure. The very existence of a mechanism to consider questions of compliance for all Parties, rather than for developed ones only, is a major novelty. However, whether Parties to the Paris Agreement have the political will to build a robust compliance framework remains to be seen. With increasingly leveled and procedural state obligations, however, it is vital that all Parties are subjected to a rigorous scrutiny over implementation and compliance. This could be something in which the Council could be of assistance.

If the Council decided to exercise enforcement powers in relation to climate change, it would seem superfluous for it to monitor compliance, review implementation, conduct expert assessments, or facilitate technical assistance, as similar functions are already performed by bodies and processes established under the climate regime. Unlike those under the climate regime, however, bodies established under Chapter VII have, at least in principle, enforcement powers and can take binding decisions. The practice of the counter-terrorism enforcement bodies analysed in section 4 nevertheless clearly shows that so far the Council has resorted to measures aimed to encourage, rather than enforce compliance. In theory the enforcement powers of the Council could be useful to address perceived shortcomings in the functioning of extant review processes under the climate regime. For example, whereas developed country Parties have generally complied with their reporting obligations, only few developing countries have done so. While this is largely the result of lack of capacity to comply with highly technical reporting obligations, the adoption of a specific enforcement measures, such as economic sanctions,¹⁶² by the Council could encourage negligent states to abide to their reporting obligations, and to adhere to the recommendations emerging from the review process. It seems, however, unlikely that the Council will decide to use such draconian measures to ensure compliance with reporting obligations under the climate regime. These measures may even be counterproductive, incentivising states to submit

¹⁵⁵ As argued also Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25:2 *Review of European, Comparative and International Environmental Law* 142, 146; and Annalisa Savaresi, 'The Paris Agreement: A Rejoinder' (*EJIL: Talk!*, 16 February 2016) <<http://www.ejiltalk.org/the-paris-agreement-a-rejoinder/>> accessed 14 September 2016.

¹⁵⁶ Paris Agreement, Article 4.13; and Decision 1/CP.21, at 31.

¹⁵⁷ Decision 1/CP.21, at 85.

¹⁵⁸ Paris Agreement, Article 13.

¹⁵⁹ Paris Agreement, Article 14.

¹⁶⁰ Decision 1/CP.21, at 99.

¹⁶¹ Paris Agreement, Article 15.

¹⁶² On the use of sanctions, see the chapter by F Sindico in this volume.

reports that are not adequately prepared or overstating their achievements, thus defeating the very purpose of the reporting process.

Humanitarian and environmental emergencies provide another and more promising scenario for the Council's enforcement powers, for example in the provision of finance. These issues are only partially addressed in the climate regime, which generally requires developed country Parties to provide financial assistance to developing ones and to report on implementation of such obligations.¹⁶³ The Paris Agreement has expanded existing reporting obligations, by establishing a system to monitor finance, technology transfer and capacity-building, both provided and received.¹⁶⁴ If the Council enforcement powers were to be used, it would be a matter of complementing and supplementing extant reporting processes under the climate regime, rather than duplicating them. Whether the Council's enforcement powers could meaningfully complement the work of extant review processes under the Paris Agreement, however, really depends on how these perform and on the perceived shortcomings in their operation.

6. Conclusions

This chapter investigated the use of the Council's rather pervasive powers under Chapter VII in relation to climate change. It has shown that the use of the Council's legislative powers would present a series of potential advantages in terms of speed, universality and coherence. In terms of speed, the Council is unrivalled. The Council can if necessary act in days. This is the result of the extraordinary nature of its powers, which can be exercised when the Council determines the existence of a threat to international peace and security. These characteristics in turn suggest that the use of legislative powers by the Council in relation to climate change ought to be reserved to exceptional circumstances, which cannot be addressed through ordinary enforcement and law-making processes. Council action also has clear advantages in terms of universality. Any resolution on climate change adopted by the Council would be binding on all UN member states. This would be of particular significance if the Paris Agreement does not attract wider ratification than is required for entry into force. Finally, the Council has much to offer also in terms of coherence. Decisions adopted under Chapter VII have the added benefit of taking precedence over other international obligations and therefore do not have to conform to existing international law. Council law-making could thus enhance the coherence of international action to address climate change, if used appropriately.

As far as enforcement is concerned, the Council's subsidiary bodies have been rather effective in facilitating the adoption of legislation by UN member states, even though their track record in ensuring implementation has been at best mixed. At least in theory, these bodies can apply sanctions to states failing to comply with their requirements, something that the climate regime cannot do. Yet in practice Council enforcement bodies have not used their powers in this way. They have rather opted for a facilitative approach to compliance, which is largely similar to that performed by existing treaty bodies under the climate regime.

The use of the Council's powers, however, remains problematic. The Council's exercise of legislative competence leaves much to be desired in terms of accountability, participation,

¹⁶³ Decision 1/CP.16, at 40-42.

¹⁶⁴ Paris Agreement, Article 13.8-9.

procedural fairness, and transparency of decision-making.¹⁶⁵ If the Council took on the role as global legislator on climate change, the vast majority of states would in effect be excluded from the law-making process. The contrast with the consensus-based law-making process established under the climate regime could not be starker. The perceived lack of legitimacy of the Council as a climate change lawmaker could therefore be a serious hindrance, especially vis-à-vis the existence of an international forum specifically dedicated to this purpose – the climate regime –, which has gained adhesion from virtually all states in the world.

A blanket exercise of the Council's legislative powers in relation to climate change would be especially problematic. At the substantive level, international climate change law-making entails a high level of technicality that the Council is scarcely equipped to deliver. In this connection, resort to the existing law-making processes under the climate regime is more dependable. At the formal level, resort to Chapter VII powers would evade national control over the process of treaty ratification and may on that basis be regarded as illegitimate. For all these reasons, a blanket use of Chapter VII powers by the Council in relation to climate change is unlikely.

More realistically, this chapter has suggested that the Council's powers could be used to support the implementation of existing international obligations concerning climate change. The exercise of the Council's powers would furthermore be especially useful in instances where urgent action is required to maintain or restore peace and security, as a result of the impacts of climate change. This may be the case in relation to incidents that require fast coordination of state action, for example in relation to disaster and humanitarian relief. When such incidents occur, the Council's involvement would not only be possible but indeed desirable to tackle egregious emergencies, which other law-making and enforcement processes are ill-equipped to address.

¹⁶⁵ As suggested also in Boyle and Chinkin (n 1) 115; and A Boyle, 'International Lawmaking: Towards a New Role for the Security Council?' in A Cassese (ed), *Realizing Utopia* (Oxford University Press 2012) 172.