Situating United Nations Security Council Accountability: Between Liberal-Legal and Political Constitutionalism?

Thesis submitted in accordance with the requirements of the University of Liverpool for the degree of Doctor in Philosophy

By
Ben Laurence Murphy

September 2018

Acknowledgements

Primary thanks are due to my PhD supervisors, Dr Michelle Farrell and Professor Christian Henderson. I am grateful to Chris for his help and guidance during the early stages of my PhD before his move to the University of Sussex, and for his continued guidance and encouragement since. Michelle has been so generous with her time and energy, providing a perfect mix of unfailing academic rigour, constantly challenging my ideas and encouraging me to think outside of the box, alongside support and reinforcement during moments when I doubted myself and my thesis. I could not have wished for a better supervisor. Michelle is an exceptional scholar, and as I begin to navigate my path and find my own place in the academic community, I will continue to model myself on your example.

Many thanks to Liverpool Law School for providing such a fruitful academic environment in which to conduct my research, and for funding the PhD through the Graduate Teaching Assistant programme for the first three years. Particular thanks are due to Dr Ellie Drywood, then Director of Postgraduate Research, in this regard. Since 2016, I have had the great fortune and pleasure to join the academic staff at Liverpool. It continues to be a privilege to work with such fantastic colleagues and students. On matters of substance, I have appreciated conversations with colleagues in the International Law and Human Rights Unit, especially Dr Christine Schwöbel-Patel, Dr Rob Knox and Dr Greg Messenger. My PhD journey has also (somewhat unexpectedly) involved something of an apprenticeship in public law theory. In this context, I am extremely grateful to Professor Mike Gordon for his counsel and for our annual 'accountability coffees'!

I have shared this experience with a number of exceptional postgraduate colleagues. Thanks to Dr Patrick Butchard (my partner in crime – well, partner in jus ad bellum! – for many years), Dr Katy Sowery, Dr Kerry Barry, Mark Bennett, and especially to Dr Andrew Woodhouse. It has been one of the greatest pleasures of this experience to establish these friendships, which are both professional and personal, and I am convinced that they will be life-long.

On a more personal note, I am indebted to my family in so many ways that I cannot fully articulate. However, this is one of the only opportunities I will get to put it on record, so I better give it a try! Mum and Dad have been a constant source of strength, support (financial and otherwise) and good humour. You are my anchors. My 'little' sisters, Becky and Rosie, have provided many a light relief from my work – mostly by taking the micky out of me! That you are now adults yourselves is also proof of quite how long this PhD has taken. Most of all, I wish to thank my fiancé and best friend, Anna, for having more faith in me than I will ever have in myself, and certainly more than is due. Submitting this thesis was always going to be a landmark moment, but the feeling pales in comparison to the one you gave me when you agreed to marry me. You enrich my life beyond measure. I love you.

Finally, too much happiness is not healthy for anybody, so I thank Everton Football Club for providing that much-needed balance.

Dedication

Around ten years ago, while doing a characteristically good job in feigning interest in my progress on my undergraduate degree in Politics and French, my Grandad asked: “when are you going to study a proper subject … like Law?” An LLM degree and five years of PhD research later, I feel well ‘studied’, and have hopefully carved out a small degree of expertise in the niche topic of this thesis. I am sure that my Grandad’s ambitions for me had more to do with following the money into the world of corporate law (!) but his advice led me on my life-path, and into my vocation. For that, and so many other things, I am eternally grateful. This thesis is dedicated to Joseph Murphy, the Bootle-bred factory foreman, and the greatest intellect I know.

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Abstract

It is a truism to suggest that the United Nations Security Council wields immense power under Chapter VII of the United Nations Charter. It is no surprise, therefore, that the Security Council has taken centre stage in a recent 'turn to accountability' in international legal literature. This PhD thesis presents a critical perspective of prevailing approaches adopted within this nascent literature. Following in the Kelsenian tradition, international lawyers have taken to the task of identifying the extent to which the Charter (the *lex specialis*), and general international law (the *lex generalis*) constitute binding obligations incumbent upon the Council, with judicial review of international courts and tribunals deemed central to this process. In this sense, it might appear that accountability is entirely reducible to the doctrine of international responsibility. This thesis aims to take a step back, in order to interrogate the meaning and scope of the concept of accountability in relation to this primary organ of the United Nations, not as a corollary to the linked idea of the responsibility of international organisations, but as a stand-alone concept.

An etymological inquiry into the meaning of accountability reveals its dual function: while the concept surely relates to the idea of limiting Security Council decision-making ('holding to account') it at least equally also concerns the idea of 'giving an account' (linked to the principles of participation and transparency). Any conceptualisation of accountability that overlooks this duality is therefore inchoate. In search of a more holistic understanding, this thesis situates discourses on Security Council accountability onto broader, existential debates on the 'constitutionalisation' of international institutional law. Specifically, it uses the dichotomy of legal and political constitutionalism as a heuristic device to explore the various forms that Security Council accountability might take. Legal constitutionalism prioritises the identification of substantive legal obligations incumbent upon the Security Council and the empowerment of international judicial organs to review Security Council decisions *ex post facto*. Political constitutionalism, conversely, concerns the role of political actors in the assessment of Security Council decision-making and prioritises procedural rules over substantive obligations. Through the lens of political constitutionalism, therefore, accountability also entails a prospective dimension.

To be sure, this thesis does not propose the legal/political constitutionalism dichotomy as the only way to categorise the state of the debate on Security Council accountability. Instead, it suggests that it is one possible way, a way that speaks directly to the overriding need to think politically about the concept of accountability and, by extension, about the Security Council as a political institution.

Introduction
The Strange Case of Security Council Accountability

Quis custodiet ipsos custodes?
(Who will guard the guards themselves?)

Juvenal (Satire VI, lines 347-8)

Accountability is the international legal word *du jour*.[1] It is difficult to think of a single issue of contemporary significance to international lawyers – from, *inter alia*, the threat posed by international terrorism,[2] individual criminal liability for international crimes,[3] business and human rights[4] to climate change[5] – that the recent 'turn to accountability' in international legal literature has overlooked.

However, nowhere is the trend towards accountability more apparent than in the field of international institutional law.[6] In the context of globalisation and increased international co-operation regarding issues that were formerly under the exclusive competence of the state, international institutions have in recent times significantly expanded the scope of their operations, taking action in response to an increasing range of global issues: from peace and humanitarian affairs, trade and the global economy, to environmental matters. As a result of

[1] See, eg, Vera Gowland-Debbas, 'The Security Council and Issues of Responsibility' (2011) 105 *Proceedings of the Annual Meeting (American Society of International Law)* 348, 348, who suggests that the idea that there 'can be no power without accountability has become a contemporary international buzzword'.
[2] Vincent-Joël Proulx, *Transnational Terrorism and State Accountability: A New Theory of Prevention* (Hart 2012); Elizabeth Stubbins Bates, *Terrorism and International Law: Accountability, Remedies, and Reform* (Oxford University Press 2011).
[3] Leonie Steinl, *Child Soldiers as Agents of War and Peace: A Restorative Transitional Justice Approach to Accountability for Crimes Under International Law* (Springer 2017); Kirsten J Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (Routledge 2012); Steven R Ratner, Jason S Abrams and James L Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3rd edn, Oxford University Press 2009).
[4] Elisa Giuliani, 'Business and Human Rights, History, Law and Policy: Bridging the Accountability Gap' (2017) 2(2) *Business and Human Rights Journal* 379; Anita Ramasastry, 'Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability' (2015) 14(2) *Journal of Human Rights* 237.
[5] Marc Limon, 'Human Rights Obligations and Accountability in the Face of Climate Change' (2010) 38(3) *Georgia Journal of International and Comparative Law* 543.
[6] It is commonplace to use the terms 'international institutional law' and 'law of international organisations' interchangeably. Nevertheless, in the context of this thesis the term 'international institutional law' is to be preferred. After all, the United Nations Security Council is not an international organisation *per se*, but an institutional organ within the broader international organisation of the United Nations. See, Article 2(a), Articles on the Responsibility of International Organizations (2011): '"international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality'.

this qualitative expansion, international institutions today increasingly exercise power in a way that can have a significant (often negative) impact on individual life and international law. Whereas August Reinisch observes that, traditionally, international institutions 'have been viewed as guardians of international law rather than as potential violators',[7] today the traditional status of the territorial nation-state as the sole bearer of rights and responsibilities in international law certainly appears less secure. Manifested in concerns about 'governance without government',[8] the increasing normative influence of autonomous international institutions – from the World Trade Organization, the International Monetary Fund, to the United Nations (UN) – has prompted a shift in scholarly thinking.

This shift has, in turn, prompted a search for the most appropriate concept(s) within the international legal vernacular to frame this state of affairs. 'Accountability' seems to stand above others as the chosen term of art to carry the weight of the emergent disciplinary anxieties of the international lawyer.[9] It appears, at first glance, as a useful analytical tool to temper the extremes of international institutional practice, to ensure both the legality and legitimacy of international institutions. The topic of accountability has been taken up, to varying degrees, by international bodies such as the Institut de Droit International,[10] the International Law Association[11] and the International Law Commission.[12] It has also prompted a magnitude of secondary literature.[13] Scholarly contributions have been directed at international institutions

[7] August Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 *Global Governance* 131, 131.

[8] James N Rosenau and Ernst-Otto Czempiel (eds), *Governance without Government: Order and Change in World Politics* (Cambridge University Press 1992).

[9] See, further, chapter 3, section 1, of this thesis which, drawing on and adding to the notion as discussed in Richard Collins, *The Institutional Problem in Modern International Law* (Hart 2016) 225-234, categorises these disciplinary anxieties in terms of an 'authority problem', a 'systemic problem', a 'fragmentation problem' and a 'deformalisation problem'.

[10] L'Institut de Droit International, 'The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties' (Lisbon 1995) (Fifth Commission, Rapporteur: Rosalyn Higgins) 66 *Annuaire de L'Institut de Droit International.*

[11] International Law Association, 'Report on the Accountability of International Organisations' (Berlin Conference 2004).

[12] International Law Commission, Draft Articles on the Responsibility of International Organizations, with Commentaries, in Report on the Work of Its Sixty-third Session (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10.

[13] The contribution of Jan Klabbers, in particular, stands out. See, Jan Klabbers, 'Self-Control: International Organizations and the Quest for Accountability' in Malcolm Evans and Panos Koutrakos (eds), *The International Legal Responsibility of the European Union* (Hart 2013); 'Unity, Diversity, Accountability: The Ambivalent Concept of International Organisation', 14 *Melbourne Journal of International Law* (2013) 149 and 'Controlling International Organizations: A Virtue Ethics Approach' (2011) 8 *International Organizations Law Review* 285. See, further, Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (eds) *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010); Sumihiro Kuyama (ed) *Envisioning Reform: Enhancing United Nations Accountability in the Twenty-First Century* (United Nations University Press 2009); Ralph Wilde, 'Enhancing Accountability at the International Level: The Tension Between International

in general, typically concerned with questions of *ratione personae* and legal subjectivity. However, more directed interventions have also been levelled at specific institutions, especially those associated with the UN. In this context, accountability of the protagonist of this thesis, the UN Security Council, has emerged as a critical question.

The invocation of the concept of accountability in relation to the Security Council is a somewhat logical development. As the principal political organ of the UN, it is a truism to state that the Council wields immense power under the UN Charter. Pursuant to Article 24(1), the Council sits at the heart of the UN collective security regime:

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

In order for the Council to fulfil its 'primary responsibility for the maintenance of international peace and security', the Charter provides two main enforcement mechanisms: the pacific dispute resolution and socio-economic cooperation contained in Chapters VI and X of the UN Charter[14] and the coercive powers conferred to the Security Council under Chapter VII. This thesis is specifically concerned with the latter. Under Chapter VII, upon a determination that a situation constitutes a 'threat to the peace, breach of the peace, or act of aggression'[15] (and the Council enjoys a wide degree of discretion in this regard) the door is opened for the Council to invoke a range of non-forcible and forcible enforcement measures. Crucially, a decision to invoke enforcement measures is binding on all members of the international community.[16] In relation to forcible measures, in the absence of a legal claim to be acting in self-defence, in

Organization and Member State Responsibility and the Underlying Issues at Stake' (2006) 12(2) *ILSA Journal of International and Comparative Law* 395; August Reinisch, 'Accountability of International Organizations According to National Law' (2005) 36 *Netherlands Yearbook of International Law* 119; Gerhard Hafner, 'Accountability of International Organizations ─ A Critical View' in Ronald St John Macdonald and Douglas M Johnston (eds) *Towards World Constitutionalism: Issues in The Legal Ordering of The World Community* (Nijhoff 2005); Chris de Cooker, *Accountability, Investigation and Due Process in International Organizations* (Martinus Nijhoff 2005); Karen Wellens, 'Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap' (2004) 25(4) *Michigan Journal of International Law* 1159; William E Holder, 'Can International Organizations be Controlled - Accountability and Responsibility' (2003) 97 *Proceedings of the Annual Meeting of the American Society of International Law* 231; Anthony Arnull and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002); For an earlier overview of the issues at stake, see August Reinisch, 'Securing the Accountability of International Organizations (2001) 7(2) *Global Governance* 131.

[14] UN Charter (1945), arts 33(1), 33(2), 62, 63 and 67.

[15] UN Charter (1945), art 39.

[16] United Nations Charter (1945), arts 25 and 103.

accordance with the general prohibition against the threat or use of force and the rules of the *jus ad bellum* which accompany it, an authorisation of the Security Council is the only legal recourse to the use of military force.[17] In other words, under Chapter VII the Council enjoys a monopoly over non-defensive uses of force in international law. All this considered, the sentiment expressed by José Alvarez that the Council is 'potentially the most powerful supranational organ in the world' is therefore difficult to deny.[18] This thesis, in short, places the concept of accountability under the spotlight in relation to this principal organ of the UN. It offers the first comprehensive study of the meaning, scope, and applicability of accountability in relation to Security Council decision-making under Chapter VII.[19]

1. The Security Council's Janus-Faced Relationship with Accountability

The scope of this thesis is limited to a deconstruction of accountability as it relates *to the Security Council*, as opposed to the Council's own use of the term in its institutional practice. It is important to acknowledge, however, that the Security Council's relationship with the concept of accountability is particularly Janus-faced. In many ways, it resembles Robert Louis Stevenson's *Strange Case of Jekyll and Hyde*. The emergence of discourse pertaining to Security Council accountability has been contemporaneous with an increased acknowledgement, from the Council itself, that the promotion of accountability is central to the operationalisation of its mandate. This invokes an image of the Security Council as Dr Jekyll: strong, decent, and well-respected. However, the Council does not, on the whole, practice that which it preaches.[20] In other words, the Council has been extremely reluctant to accept its own accountability deficits with the same vigour that it purports to promote accountability elsewhere. This is problematic, as in recent times the Council has been extensively criticised for the manner in which it has exercised its wide-ranging Chapter VII

[17] UN Charter (1945), arts 2(4), 24, 25, 39 and 42.
[18] José E Alvarez, 'The Once and Future Security Council' (1995) 18(2) *The Washington Quarterly* 1, 5; Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008) 3: The Council is 'the most powerful international institution in the history of the nation-state system'.
[19] The thesis is comprehensive in the sense that it is not limited to one particular aspect of the Security Council's practice. To the extent that the concept has emerged in the nascent literature, Security Council sanctioning practice currently dominates the discourse. Indicative contributions to the debate include Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford University Press 2016); Jeremy Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge University Press 2007). See, particularly, Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2011).
[20] Jeremy M Farrall, 'Rule of Accountability or Rule of Law? Regulating the UN Security Council's Accountability Deficits' (2014) 19(3) *Journal of Conflict and Security Law* 398, 407: 'The biggest challenge … remains how to encourage the Security Council to 'walk the walk' as well as 'talk the talk'.

powers. In this context, the image of Mr Edward Hyde, Dr Jekyll's violent, cruel, doppelganger comes to mind.

1.1. Jekyll: The Security Council as a Promotor of Accountability

The former Secretary-General Kofi Annan once reported that 'we need new mechanisms to ensure accountability. Where there is accountability we will progress; where there is none we will underperform'.[21] His successor, Secretary-General Ban Ki-Moon, also spoke in terms of a 'new age of accountability'.[22] The Security Council has embraced the 'turn to accountability' of its parent organisation, the United Nations, in both its discourse and its practice. Specifically, in the last two decades, Council practice suggests a growing understanding that promoting individual accountability under international criminal law, international humanitarian law and international human rights law, is an important tool at its disposal in discharging its 'primary responsibility for the maintenance of international peace and security' and that, as a corollary, individual impunity and immunity can undermine international peace. The role that the Council has taken on is best conceptualised as that of promoting, or even enforcing, accountability. Both chronologically and thematically, this should be read in the context of the Security Council's broader mandate to promote, or enforce, the international rule of law. The rule of law was a central item on the Security Council's agenda between 2003 and 2013.[23] In its final presidential statement on the matter, we find perhaps the clearest statement that the Council perceives its own rule of law mandate to be the promotion of individual accountability. The statement stressed the importance of the 'fight against impunity and to ensure accountability for genocide, crimes against humanity, war crimes and other egregious crimes'.[24] While the

[21] Report of the Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (2005) UN Doc A/59/2005.
[22] UNSG Press Release, 'In 'New Age of Accountability', International Criminal Court, Security Council Can Work Together to 'Deliver Both Justice and Peace'' (2012) UN Doc SG/SM/14589 <http://www.un.org/News/Press/docs/2012/sgsm14589.doc.htm>
[23] See, generally, Security Council Report, 'Cross Cutting Report, The Rule of Law: The Security Council and Accountability'(19 January 2013) <https://www.securitycouncilreport.org/atf/cf/%7b65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7d/cross_cutting_report_1_rule_of_law_2013.pdf>. Strengthening the rule of law was first inscribed on the Security Council's agenda in September 2003. The Security Council held eight meetings on the rule of law and adopted six presidential statements. See, UN Docs S/PV.4833 and S/PRST/2003/15 (24 September 2003); UN Docs S/PV.5052 and S/PRST/2004/34 (6 October 2004); UN Docs S/PV.5474 and S/PRST/2006/28 (22 June 2006); UN Docs S/PV.6347 and S/PRST/2010/11 (29 June 2010); UN Docs S/PV.6705 and S/PRST/2012/1 (19 January 2012); UN Doc S/PV.6849 (17 October 2012); UN Doc S/PV.6913 (30 January 2013); and UN Docs S/PV.7113 and S/PRST/ 2014/5 (21 February 2014). At this final meeting, the Security Council adopted the 'Report of the Secretary-General on measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations' (11 June 2013) UN Doc S/2013/341 and the Council ceased its consideration of the matter as an agenda item.
[24] UN Doc S/PRST/ 2014/5 (21 February 2014) at 3.

statement did acknowledge that 'Member States are increasingly demanding strengthened accountability from the United Nations with regard to the impact of its operations',[25] the positive contribution of the Security Council to securing the international rule of law through the promotion of accountability was seemingly taken for granted.[26]

A more granular view of Security Council practice suggests the same conclusion. To date, the word 'accountability' has featured in a total of 270 resolutions and 69 presidential statements.[27] Without context, these figures could be misleading. It is telling, however, that 95 of these references have been found in resolutions since the beginning of 2014.[28] We can, therefore, point to a clear move within the Security Council in its understanding that the promotion of accountability, externally, is a key element of its responsibility to maintain international peace and security. Between January and July 2018 alone, the Security Council passed eleven resolutions which emphasised the importance of ending impunity and holding perpetrators of egregious international crimes to account. This amounts to exactly one-third of all resolutions passed during this period. Individual criminal liability thus stands out as the primary meaning that the Council itself has ascribed to the term.[29]

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[25] 'Report of the Secretary-General on measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations' (11 June 2013) UN Doc S/2013/341, para 3.

[26] UNGA Res 67/1, 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels' (30 November 2012) UN Doc A/RES/67/1, at 28: 'We recognize the positive contribution of the Security Council to the rule of law while discharging its primary responsibility for the maintenance of international peace and security'.

[27] See, most recently, 'Statement by the President of the Security Council' (15 December 2014) UN Doc S/PRST/2014/26, at 2 (in relation to the situation in South Sudan): 'The Security Council underscores the significant importance of fighting impunity and ensuring *accountability* for serious violations and abuses of human rights and serious violations of international humanitarian law…' (emphasis added).

[28] See, Farrall (n 20) 398-9, who conducted a similar search in 2014. Farrall concluded that by the end of 2013 the term accountability had been used in 175 resolutions.

[29] Illustrating this broad trend, see UNSC Res 2427 (9 July 2018) UN Doc S/Res/2427 (on children and armed conflict), at para 18: '[The Security Council] *[R]emains* gravely concerned by the human rights abuses and violations of international humanitarian law committed by all non-state armed groups, including those who commit acts of terrorism, including abuses and violations such as mass abductions and sexual and gender-based violence, … and emphasizing the importance of *accountability* for such abuses and violations…' (emphasis added). See also, reflecting an almost identical sentiment across a range of different contexts: Security Council 2429 (13 July 2018) S/RES/2429 (extending mandate of UNAMID) at 2; UNSC Res 2428 (13 July 2018) UN Doc S/RES/2428 (renewing targeted sanctions in South Sudan), preamble; UNSC Res 2423 (28 June 2018) (extending mandate of MINUSMA) UN Doc S/RES/2423, preamble; UNSC Res 2421(14 June 2017) UN Doc S/RES/2421 (extending mandate of UNAMI), at para 2(d); UNSC Res 2417 (24 May 2018) UN Doc S/RES/2417 (on conflict-induced food insecurity), preamble and para 10; UNSC Res 2408 (27 March 2018) UN Doc S/RES/2408 (extending mandate of UNSOM) preamble; UNSC Res 2409 (27 March 2018) UN Doc S/RES/2409 (extending mandate of MONUSCO) preamble and paras 11, 19, 40; UNSC Res 2406 (15 March 2018) UN Doc S/RES/2406 (extending mandate of UNMISS) at para 31; UNSC Res 2405 (8 March 2018) UN Doc S/RES/2405 (on the situation in Afghanistan), preamble; UNSC Res 2404 (28 February 2018) (on the situation in Guinea-Bissau) UN Doc S/RES 2404, preamble and para 20.

In terms of concrete measures, the Security Council has taken steps to facilitate individual criminal accountability, for example by including by establishing ad hoc criminal tribunals.[30] It has also used its power of referral to the International Criminal Court (ICC), as empowered pursuant to Article 13(b) of the Rome Statute, on two occasions. The first exercise of this jurisdiction related to the situation in Darfur, Sudan.[31] This is a particularly important example, as Sudan is a signatory but not a State Party to the Rome Statute. Therefore, in the absence of the Security Council's authorisation, the Court would not have been able to exercise jurisdiction generally over its territory, except with respect to nationals of States Parties.[32] In the more recent example, in referring the situation in Libya to the Court, the Council's jurisdiction to act was more straightforward. Accountability again emerged as a key theme of the referral, however, as the resolution stressed 'the need *to hold to account* those responsible for attacks … on civilians'.[33]

Whereas the examples above are thematically directed toward the promotion of individual accountability, the Council has also directed at a governmental level. We might broadly refer to this as the promotion of 'good governance', and identify three main categories.[34] First, the term 'accountability' has been used as part of calls to prevent the misuse of humanitarian assistance and UN expenditure, for example in Somalia.[35] Linked to this, the Council has repeatedly reiterated that adherence to the principle of accountability, alongside 'inclusive political dialogue, respect of the rule of law, democratic governance, participation of women in peacebuilding, respect for human rights, justice … and economic development' is necessary

[30] UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY)); UNSC Res 955 (8 November 1994) UN Doc S/RES/955 (establishing the International Criminal Tribunal for Rwanda).
[31] UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593.
[32] Robert Cryer, 'The International Criminal Court and its Relationship to Non-Party States' in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 115, 117.
[33] See, eg, UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970, at para 4.
[34] This framing draws on Farrall (n 20) 402-3.
[35] See, eg, UNSC Res 2093 (6 March 2013) UN Doc S/RES/2093, at para 4.

to maintain lasting peace in post-conflict situations.[36] Finally, the Council has used the term 'accountability' to relate to how governments control their security sectors.[37]

There is a crucial distinction, however, between the Council's invocation of the concept of accountability in order to promote and enforce *external* dimensions of accountability, and the *internal* institutional accountability of the Council itself. It is to the latter that we will now turn.

1.1. Hyde: Towards Accountability of the Security Council

1.1.1. The Security Council and its Images

The Security Council's position at the heart of the UN collective security system has prompted some authors to liken the institution to a 'world policeman'.[38] Taking this even further, Martti Koskenniemi has suggested 'an image of the Council as a post-Cold War Leviathan; not only as police but as judge, or perhaps even priest, of a new world order'.[39] Although Jeremy Waldron suggests that international law 'does not rest on the existence of 'an uncommanded commander",[40] it is, in some ways, possible to relate the institutional (or sovereign) status of the Security Council to the 'Hobbesian problem' of subjecting the sovereign to his own laws.[41] The traditional problem is known in its Hobbesian formulation, though Thomas Hobbes, of course, did not regard it as a problem at all. In fact, Hobbes thought it was undesirable to try to subject the absolute sovereign to the law, partly because he saw this as a recipe for conflict. Desirable or not, he also thought it was impossible. To Hobbes, it was ultimately the prerogative of the sovereign to control the application of the law:

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[36] UNSC Res 2088 (24 January 2013) UN Doc S/RES/2088 (on the situation in the Central African Republic), preamble. See, more recently, UNSC Res 2288 (25 May 2016) UN Doc S/RES/2288 (terminating measures on arms imposed against Liberia) preamble: 'lasting stability in Liberia will require the Government of Liberia to sustain effective and accountable government institutions'.

[37] Statement by the President of the Security Council (12 October 2011) UN Doc S/PRST/2011/19: '[T]he establishment of an effective, professional and accountable security sector is at the cornerstone of peace and sustainable development'.

[38] In 1942, President Roosevelt had proposed that the Great Powers act as 'policemen' to manage world affairs, and this is the role he foresaw for the Security Council. See, David Malone, *Five to Rule Them All: The UN Security Council and the Making of the Modern World* (Oxford University Press 2009) 14-15.

[39] Martti Koskenniemi, 'The Place of Law in Collective Security' (1996) 17(2) *Michigan Journal of International Law* 455, 460. See, further, Martti Koskenniemi, 'The Police in the Temple: Order, Justice and the UN: A Dialectic View' (1995) 6 *European Journal of International Law* 325.

[40] Jeremy Waldron, 'Are Sovereigns Entitled to the Benefits of the International Rule of Law?' (2011) 22(2) *European Journal of International Law* 315, 318: 'There is no constituted agency at the international level the subjection to law of which would generate the sort of paradoxes or regresses that Hobbes was talking about'.

[41] Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford University Press 2005).

> The sovereign of a commonwealth, be it an assembly or one man, is not subject to the civil laws. For having power to make and repeal laws, he may, when he pleaseth, free himself from that subjection by repealing those laws that trouble him, and making of new; and consequently he was free before.[42]

However, unlimited discretionary power would appear antithetical to any conception of the rule of law. Considering the unprecedented degree of power at the Council's disposal, parallels to Jekyll and Hyde may not, therefore, be too much of an exaggeration. At the extreme end of the debate, this chimes with Walter Benjamin's infamous conviction that 'in the ruler, the supreme creature, the beast can re-emerge with unsuspected power'.[43] José Alvarez has suggested that the 'fact that organizations take on a life of their own once created and evince certain pathologies means that at least some of them might indeed become, or at least be perceived as, global Frankenstein monsters'.[44] The analogy is perhaps most striking if put in the following terms: 'Frankenstein set out to defeat death but instead got a monster that killed innocent humans'.[45] The power of the Security Council to impose coercive measures against states and individuals alike, with very little in the way of due process obligations threatens 'to dispense with, by the stroke of a pen, the limitations on governmental tyranny that peoples have fought hard to win within their domestic polity'.[46] It is specifically this sentiment, that arbitrary institutional power should be limited by (international) law, that has given rise to recent discourse on Security Council accountability.

1.2.1. Tracing the Debate: Three Waves

[42] Thomas Hobbes, *Leviathan* (first published 1651, Richard Tuck ed, Cambridge University Press 1988) 184. See, further, ibid 224: 'For to be subject to laws, is to be to be subject to the commonwealth, that is to the sovereign representative, that is to himself…'

[43] Walter Benjamin, *The Original of German Tragic Drama* (first published 1928, Verso 1998) 86.

[44] José Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2005) 586; see, further, Andrew Guzman, 'International Organization and the Frankenstein Problem (2013) 24(4) *European Journal of International Law* 999.

[45] Andrew Guzman, 'International Organization and the Frankenstein Problem (2013) 24(4) *European Journal of International Law* 999, 1000; see, further, Daniel L Nielson and Michael J Tierney, 'Delegation to International Organizations: Agency Theory and World Bank Environmental Reform' (2003) 57 *International Organization* 241, 244: International organizations 'are like global Frakensteins terrorizing … the international countryside … they take on a life of their own and are largely beyond the control of their creators'; Michael N Barnett and Martha Finnemore, 'The Politics, Power and Pathologies of International Organizations' (1999) 53(4) *International Organization* 699, 699, who advocate for an approach that can 'explain both the power of [international organisations] and their propensity for dysfunctional, even pathological, behaviour'.

[46] Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford University Press 2005) 14.

The foundational question of whether the Security Council should, or even could, be subjected to legal limitation was first considered at the San Francisco Conference in 1945. The representative of Norway suggested that:

> A basic rule of conduct must be formulated as a restraint on the Security Council and as a guarantee that it would not resort to a 'politique de compensation'. Whatever sacrifices the Security Council might require of a nation should not be of such a nature as to impair the confidence of that nation in its future.[47]

Drafted as the Second World War was still waging, and coming into effect in its immediate aftermath, it is, however, true to say that the most powerful nations of the day were extremely reluctant to accept any impediments to the effective operation of the Security Council's power. Norway's proposal was rejected. Ultimately, it was decided that it should be the Council, and only the Council, that is in a position to determine the scope of the competencies delegated to it through the Charter and whether its actions comport with that delegation.[48]

Hence, during the Cold War period (the 'first wave'), there was almost no discussion of limiting the power of the Council, let alone broader questions of accountability.[49] In one of the earliest studies, Clyde Eagleton observed that the Charter actually gave the organs of the UN very little authority under which it could cause harm to others.[50] Hans Kelsen had discussed the scope of the obligation on member states to carry out decisions of the Security Council,[51] concluding that, ultimately, 'the Security Council is not bound strictly to comply with existing law'.[52] Finn Seyersted, in the course of considering the relationship between UN military forces and the

[47] Documents of the UN Conference on International Organization (1945) Vol XI, at 378.
[48] This is traditionally formulated as the legal principle of 'kompetenz-kompetenz'. See, eg, Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (Martinus Nijhoff 1994) 81.
[49] See, for an extremely rare example, Benedetto Conforti, 'The Legal Effect of Non-Compliance with Rules of Procedure in the UN General Assembly and Security Council' (1969) 63 *American Journal of International Law* 479.
[50] Clyde Eagleton, 'International Organization and the Law of Responsibility' (1950) 76 *Collected Courses of the Hague Academy of International Law* 323, 325; Mahnoush H Arsanjani, 'Claims Against International Organizations: Quis Custodiet Isos Custodes' (1981) 7(2) *Yale Journal of World Public Order* 131, 131-2:'The Organization had no army, navy, or military instruments through which to impose its wishes and little trade activity, territory, or population to protect … at most, the Organization would infrequently undertake activities causing injuries'.
[51] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Praeger 1950) 95-98. This question again gained prominence in the aftermath of the International Court of Justice's Advisory Opinion in *Namibia.* See, eg, Rosalyn Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions Are Binding under Article 25 of the Charter?' (1972) 21 *International and Comparative Law Quarterly* 270.
[52] Ibid 275; cf Hans Kelsen, *Principles of International Law* (Rinehart 1952) 174. Kelsen accepted that as a concomitant to the possession of rights and responsibilities, the United Nations must have the capacity to sustain such countermeasures, to be their object or recipient. However, the question of whether this capacity extended to the organs of the United Nations was not addressed.

doctrine of international legal responsibility, suggested that any limits of the powers of the UN and its organs are 'internal, constitutional matters' and found that for this reason there could be no external limits.[53]

In a seminal essay of 1965, Eli Lauterpacht asked '[w]hat legal effects, if any, have the illegal acts of international organisations?' He suggested that 'neither states nor international organisations have yet worked out an adequate answer to this question'.[54] To Lauterpacht's contemporary, Robert Jennings, 'the enervating effect of the lack, or near lack, of courts with compulsory jurisdiction is nowhere more damaging than in this aspect of international law'.[55] The critical point, therefore, is that during the Cold War, even where the question of legal limitations emerged, the general unanimity was that they would few and far between. While commentators such as Jennings thought this was potentially problematic, he did not deny that it was nevertheless the case.

Of course, the lack of attention (or even indifference) to questions of accountability during this period might be explained by the fact that, for the first forty-five years of its history, the Security Council's significant power remained largely hypothetical. During the Cold War, the ideological differences that existed between China, France, Russia, the United Kingdom and the United States as the permanent, veto-wielding members of the Council resulted in almost complete political paralysis. The collective security system envisaged by the drafters of the Charter had not been fully realised.

Since the fall of the Berlin Wall, and the newfound consensus then apparent between the United States and Russia in particular, during the 1990s there was a significant reduction in the use of the veto. During this period of 'revitalisation', the Security Council significantly expanded its original mandate to the point that today its normative reach extends way beyond anything that could have been anticipated by the drafters of the Charter.

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[53] 'United Nations Forces—Some Legal Problems' (1961) 37 British Yearbook of International Law 351, 458-60.

[54] Eli Lauterpacht, 'The Legal Effect of Illegal Acts of International Organisations', in *Cambridge Essays in International Law: Essays in Honour of Lord* McNair (Stevens and Sons 1965) 88, 88.

[55] RY Jennings, 'Nullity and Effectiveness in International Law' in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (Stevens and Sons 1965) 86.

One particular event, which prompted the *Lockerbie* case before the International Court of Justice (ICJ), sparked a 'second wave' of literature, which laid the foundations for the contemporary debate. It is for this reason that it is illustrative to briefly provide some context. The case arose out of demands emanating from the United States and the United Kingdom for Libya to surrender for trial two Libyan nationals accused of carrying out the bombing of Pan Am Flight 103 over Lockerbie, Scotland, in September 1988. In January 1992 the Security Council adopted Resolution 731 urging Libya 'to provide a full and effective response' to the requests.[56] In March 1992, Libya filed applications in the ICJ, requesting a judgment declaring that the question of extradition fell within the scope of the Montreal Convention, to which all three states were parties.[57] Libya argued that it was complying with its obligations under that Convention and that the United States and the United Kingdom were, in fact, in violation of their obligations under that Convention. Libya also filed an application, under Article 41 of the Court's Statute, requesting the indication of provisional measures, which would put a hold on any further measures that would coerce Libya to surrender suspects to any jurisdiction outside Libya. When the Court was still deliberating, the Security Council adopted Resolution 748, in which it determined that the situation constituted a 'threat to international peace and security'[58] and, acting under Chapter VII of the Charter, imposed binding sanctions on Libya in the event that Libya failed to comply with the extradition demand.[59] Ultimately, Libya's requests for provisional measures were dismissed by the Court. It considered that, by virtue of Article 25 of the Charter, member states are obliged to accept and carry out the decisions of the Security Council.[60]

Nevertheless, the case gave rise to a number of legal questions, questions that had simply not been of relevance during the Cold War paralysis. Judge Bedjaoui, in particular, prompted debate around whether there were any legal hurdles to initiating measures under Chapter VII.[61] This has given rise to important questions in relation to the legal regime that governs Security Council decision-making procedures in this 'modern' period of revitalisation. The 'second wave' of literature was thus specifically concerned with the question of judicial review of

[56] UNSC Res 731 (21 January 1992) UN Doc S/RES/731, at para 3.
[57] Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (signed 23 September 1971, entered into force 26 January 1973).
[58] UNSC Res 748 (31 March 1992) UN Doc S/RES/748, preamble.
[59] Ibid, at paras 4-7.
[60] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v UK; Libya v United States)* [1992] (Provisional Measures) ICJ Rep 3, at 114 (the two orders are essentially the same).
[61] *Libya v United States* (dissenting opinion of Judge Bedjaoui) at 153.

Council decisions. The competency of the ICJ received particular attention.[62] The defining element of the more recent 'third wave' is that there is an identifiable shift in the tenacity of the arguments for the enforcement of legal limits against the Council, as well as a shift toward framing these questions as relating specifically to the concept of 'accountability'. In certain instances, the concept of accountability has been used explicitly as a central framing device to approach these issues.[63] In other instances, the concept is invoked but in a more general, cursory manner.[64] Two things can nevertheless be implied from this. First, whether invoked explicitly or implicitly, 'accountability' has recently emerged as the chosen term of art to express criticism against the Security Council. Second, this move has been driven primarily by the expansive nature of the Council's own practice.[65]

2. On Accountability and Global Constitutionalism

[62] See, eg, Bedjaoui (n 48) particularly 37-95. See, also, Dapo Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46(2) *International and Comparative Law Quarterly* 309; José E Alvarez, 'Judging the Security Council' (1996) 90 *American Journal of International Law* 1; Ian Brownlie, The Decisions of Political Organs of the United Nations and the Rule of Law' in Ronald St John Macdonald (ed), *Essays in Honour of Wang Tieya* (Martinus Nijhoff 1994) 91; Thomas M Franck, 'The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?' (1992) 86(3) *American Journal of International Law* 519; Vera Gowland-Debbas, *Collective Responses to Illegal Acts in International Law—United Nations Action in the Question of Southern Rhodesia* (Nijhoff 1990); Vera Gowland-Debbas , 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 *International and Comparative Law Quarterly* 55; Vera Gowland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie* Case' (1994) 88 *American Journal of International Law* 643; Derek Bowett, 'Judicial and Political Functions of the Security Council and the International Court of Justice' in Hazel Fox (ed), *The Changing Constitution of the United Nations* (British Institute of International and Comparative Law 1997); Karl Doehring, 'Unlawful Resolutions of the Security Council and their Legal Consequences' (1997) 1(1) *Max Planck Yearbook of United Nations Law* 91; Bernd Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?' (1999) 10(3) *European Journal of International Law* 517; Krzysztof Skubiszewski, 'The International Court of Justice and the Security Council' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice – Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996) 606.

[63] See, particularly, Philippa Webb and Christopher Michaelsen (eds), Special Issue on 'Strengthening the Accountability of the UN Security Council' (2014) 19(3) *Journal of Conflict and Security Law* 385, and articles therein. See, further, Vera Gowland-Debbas, 'The Security Council and Issues of Responsibility' (2011) 105 *Proceedings of the Annual Meeting (American Society of International Law)* 348; Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (eds), 'Introduction' in *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press 2008) 39-43.

[64] See, eg, Alexander Orakhelashvili, 'The Acts of the Security Council: Meaning and Standards of Review' (2007) 11 Max Planck Yearbook of United Nations Law 143; Machiko Kanetake, 'Enhancing Community Accountability of the United States and United Kingdom through Pluralistic Structure: The Case of the 1267 Committee' (2008) 12 *Max Planck Yearbook of United Nations Law* 113; Erika de Wet and André Nollkaemper (eds), *Review of the Security Council by Member States* (Intersentia 2003) August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95(4) *American Journal of International Law* 851.

[65] Tzanakopoulos (n 19) 2: 'recent interest in the accountability of international organizations is owed primarily to this extensive activity of the Security Council'.

The question of Security Council accountability – in fact, the idea of accountability in international institutional law generally – is generally under-theorised. Conventional approaches seem to take for granted that accountability can be ascribed a specific international legal meaning, all the while ignoring its status as an essentially contested concept in other contexts. In pursuit of a theoretical framework to capture the turn to accountability, we note that accountability is a concept traditionally associated with the discipline of constitutional law, or public law, broadly defined. From this conceptual point of departure, this thesis hypothesises that the meaning, scope, and applicability of the concept of accountability in relation to the Security Council will be linked, in some way, to the broader emergence of a distinctly 'constitutional' vernacular in international institutional law.[66] Indeed, international lawyers have, in recent times, tended to respond to the challenges outlined above by reverting to constitutional law analogies and principles, 'in order to find some universal vocabulary by which it might be possible to bring order to disunity and to restrain the exercise of arbitrary public power'.[67] Accountability is but one of these principles.

To explain in more concrete terms how theories of global constitutionalisation are used in this thesis, it is necessary to identify two frames in which this vernacular seems to operate. In its general, descriptive frame, global constitutionalism refers to an academic and political agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere.[68] Global constitutionalisation, as a separate but obviously linked idea, relates instead to the normative frame. That is, to the gradual emergence and deliberate creation of constitutional elements in the international legal order by political and judicial actors, bolstered by an academic discourse in which these elements are identified and further developed.[69] It is important to stress at the outset, however, that this thesis does not purport to make a contribution to the general theory of 'global constitutionalism' *per se*. It does, however, use aspects of the ongoing debates on the so-called 'constitutionalisation' of international institutional law as a springboard to conceptualise accountability in the Security Council context. This thesis is concerned, primarily, with deconstructing the normative assumptions at

[66] See, eg, Jeffrey L Dunoff and Joel P Trachtman, 'A Functional Approach to International Constitutionalization' in Jeffrey L Dunoff and Joel P Trachtman (eds) *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009) 3, 30, who identify a clear 'constitutional turn in international legal discourse'.
[67] Collins (n 48) 241.
[68] Anne Peters and Klaus Armingeon, 'Introduction - Global Constitutionalism from an Interdisciplinary Perspective' (2009) 16 *Indiana Global Legal Studies* 397, 398.
[69] Ibid.

play in the nascent discourse on Security Council accountability. It argues that these resonate with one particular aspect of 'global constitutionalisation' discourse. This aspect is defined by its normative preference for the political theory of 'liberal-legalism'.

In order to illustrate these normative preferences, the notion of 'circumstances' has proven particularly illuminating. Deriving its structure from the classical and medieval rhetorical scheme of the *circumstantiae,* 'circumstances' relates to a linguistic device which encourages organising the exposition of a text around certain foundational questions, in order to demarcate a topic and construct a clear narrative: *quis, quid, cur, quomodo, ubi, quando,* and *unde* or *quibus facultatibus* (who, what, why, in what way, where, when, whence or by what means). Sometimes, these questions appear in the form of topics: *persona, res, causa, tempus, locus, modus,* and *facultas* (person, act, cause, time, place, manner, and means).[70] It would seem that when approaching the 'circumstances of Security Council accountability' the nascent literature seems to have already taken rather fixed positions in relation to each of these dialectical questions.

Consider, in this light, the following examples, which relate to some of the foundational questions at the heart if this thesis. *What* conduct gives rise to accountability obligations? Mainstream approaches, rooted as they are in the doctrine of international responsibility, seem to suggest that the Security Council can only be accountable for its actions, as it is this field that the Council can be said to have positive legal obligations. Therefore, the question of accountability for omissions would appear more problematic. *Who* should be accountable? This relates to the perennial tension in international institutional law relating to the position member states vis-à-vis the institution. States are both the creators of, and members of, the organisation. In other words, states constitute the organisation, but also have the capacity to reconstitute the organisation at any given time. States act, sometimes simultaneously, as both the founding creator of the organisations, and also as a member of the organisation.[71] This tension can be described, alternatively, as relating to the internal and external role of member states vis-à-vis

[70] Rita Copeland, *Rhetoric, Hermeneutics, and Translation* in the *Middle Ages: Academic Traditions and Vernacular Texts* (Cambridge University Press 1995) 66-86.

[71] Richard Collins and Nigel White (ed), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011). It is telling that the author of one of the leading text books in the field, and founding editor of its leading journal, dedicated his first article in its inaugural volume to this issue: Niels Blokker, 'International Organizations and their Members' (2004) 1(1) *International Organizations Law Review* 139.

the organization.[72] It relates to the question of whether of the appropriateness of conceptualising the Security Council as a unitary, autonomous actor, or whether, alternatively, whether the only way to understand the institution might be to break it into its constituent parts (and particularly the role of the permanent members).[73] *How* should the Council be held to account? By the other political organs of the United Nations – perhaps the General Assembly as the plenary organ – or by international courts and tribunals? The literature currently points to a preference for review by judicial as opposed to democratic institutions. The next consideration is temporal in nature. *When* should the Security Council be held to account? In this context, accountability appears currently to relates to a purely a retrospective concept, only to be invoked after a decision has been made. The question of whether accountability might also have a prospective dimension does not appear to have been considered. In short, the 'circumstances of accountability' speak to an explicitly legal, judicialised conception of accountability in the nascent literature. Indeed, as Devika Hovell remarks, correctly, 'central to almost every reform proposal is an insistence on the inclusion of a judicial review mechanism'.[74] This is the essence of liberal-legal constitutionalism.

The fixed positions that emerge in the nascent literature resonate with the theoretical literature on international institutional law generally, which Jean D'Aspremont suggests has been 'informed by some didactic preferences, for such a framework allows one to apprehend all the dissonances in the law of international organizations through one single lens'.[75] It is important to consider what other 'didactic preferences', or other 'lenses', the concept of accountability may provide, and in doing so, to move beyond the narrow constraints of liberal-legalism. To D'Aspremont, 'speaking in antinomic terms of the law of international organizations even constitutes the mainstream style with which this subject is discussed and debated'.[76] This is a telling observation and one which is supported by the fact that recent theoretical accounts have indeed attempted to capture the shifts taking place in the context of global governance through the use of dichotomies. For example, Nico Kirsch has explored the dichotomy between

[72] Jean D'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Techniques of International Legal Argumentation* (Edward Elgar 2015) 142.
[73] Already in 1944, Kelsen argued that the possibility of action by majority vote renders an international organization independent and non-identifiable with its member states. See, Hans Kelsen, *Peace through Law* (first published 1944, Lawbook Exchange 2000) 20-21.
[74] Hovell (n 19) 1.
[75] D'Aspremont (n 72) 146.
[76] Ibid 140.

pluralism and constitutionalism.[77] D'Aspremont himself, having initially been extremely critical of the use of dichotomies, suggests that the distinction between contractualism and constitutionalism is the most appropriate. It is also commonplace to juxtapose fragmentation and constitutionalism.[78] The leading intervention into the debate, however, has been Jan Klabbers exploration of the dichotomy between functionalism and constitutionalism.[79] The key point, across this disparate literature, is that the common denominator in all of these accounts is the idea of global constitutionalism.[80]

The principal theoretical argument of this thesis, however, is that instead of using constitutionalism as a conceptual device to measure the practice of the Security Council *against*, debates on Security Council accountability are more appropriately situated *within* the terms of constitutionalism. I submit that the single lens of legal accountability, which finds its conceptual heritage in the theory of liberal-legal constitutionalism, reveals a failure to really grapple with the concept of accountability itself, and of the nature of the Security Council as a *sui generis* institution. In this context, the dichotomy of liberal-legal and political constitutionalism is adopted as a heuristic device, at a meta-conceptual level.[81] The value of such a framework can be seen in the fact that the distinction between legal and political

[77] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010).

[78] See, eg, Andrzej Jakubowski and Karolina Wierczyńska (eds), *Fragmentation vs the Constitutionalisation of International Law: A Practical Inquiry* (Routledge 2016); Anne Peters, 'Fragmentation and Constitutionalization' in Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 1101.

[79] See, *inter alia,* Jan Klabbers, 'Functionalism, Constitutionalism and the United Nations' in Anthony F Lang and Antje Wiener (eds) *Handbook on Global Constitutionalism* (Edward Elgar 2017) 355; 'The Transformation of International Organizations Law' (2015) 26(1) *European Journal of International Law* 9; 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 3.

[80] On the turn to constitutionalism generally, see, Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009); Ronald St John Macdonald and Douglas M Johnston (eds), *Towards World Constitutionalism* (Brill Academic Publishers 2005); Christine Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff 2011); Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009); Erika de Wet, 'The International Constitutional Order' (2006) 55(1) *International and Comparative Law Quarterly* 51.

[81] On political constitutionalism, see, eg, Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007). See, further, Adam Tomkins, *Our Republican Constitution* (Hart 2005); Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 *Oxford Journal of Legal Studies* 157; Graham Gee and Grégoire CN Webber, 'What is a Political Constitution?' (2010) 30(2) *Oxford Journal of Legal Studies* 273; Mark Tushnet, *Taking the Constitution Away From the Courts* (Princeton University Press 1999). Although ambivalent to the distinction between legal and political constitutionalism, the work of Jeremy Waldron, especially *Law and Disagreement* (Oxford University Press 1999) should also be included in the wider canon of political constitutionalism.

constitutionalism has already been described explicitly as relating to conceptions of accountability:

> a political constitution is one in which those who exercise political power … are held to constitutional account through political means, and through political institutions … A legal constitution, on the other hand, is one which imagines that the principal means, and the principal institution, through which the government is held to account is the law and the court-room.[82]

The narrow trajectory of the current debate focuses our attention on legal scrutiny, arguably ideological legal scrutiny, and leaves no space for the vast potential of political scrutiny. This thesis attempts to open up the theoretical space to reimagine accountability mechanisms through a political constitutionalist lens and, in doing so, to reframe accountability as a device to secure not only the legality but also the political legitimisation of Security Council decision-making. Accountability is not an intrinsically legal concept; its use as an analytical frame thus opens the door for a broader inquiry into the nature of the Security Council.

To be sure, this thesis does not propose that the dichotomy of legal and political constitutionalism is the only way to categorise the state of the debate. Instead, it simply proposes that it is one possible way, a way that speaks directly to the overriding need to think politically about the concept of accountability and, by extension, about the Security Council as a political institution.

[82] Adam Tomkins, *Public Law* (Oxford University Press 2003) 18-19.

Part I. Context

I. The Security Council's Accountability Deficits

Introduction

It is impossible to understand the Security Council's relationship with the concept of accountability without first clarifying the constitutional context within which the Council operates. Section one of this first chapter places this primary organ of the United Nations in such a context by examining its history, composition and voting procedures. Section two zeroes in on the specific enforcement measures at the Council's disposal when acting under Chapter VII, which give rise to the Security Council's 'accountability deficits'. The final section considers these deficits and offers a threefold typology: 'illegality', 'ambiguity', and 'inaction'. The first dimension, 'illegality', is the one that comes to mind most naturally, as it has dominated the nascent discourse thus far. On various occasions since the end of the Cold War, international lawyers have accused the Council of stretching its mandate to the point that its decisions have flirted with – or even exceeded – the boundaries of its constitutional competence. However, the key theme throughout this thesis is that accountability, as a concept, has a wider potential than merely ensuring the legality of Council decision-making under Chapter VII. It is thus argued that placing disproportionate attention on the 'legality' deficit serves to mask two equally important aspects. First, while the Council enjoyed a newfound political consensus in the immediate post-Cold War era, this consensus has today largely dissipated. The issue of 'inaction', especially in relation to the ongoing humanitarian crisis in Syria, dominates critical discourse on the Council as much as at any other time in its history. In between these two poles, in order to reach a decision in situations where political consensus between permanent, veto-wielding members is impossible, recent practice has also witnessed a trend of 'ambiguity' in Security Council resolutions. Ambiguity can have deleterious consequences for the perceived legitimacy of the Council, as it is not always clear whether the Council has, in fact, authorised enforcement measures.

Danielle Hanna Rached suggests that the most plausible way to defend and justify the use of accountability as a framework of analysis is 'instrumentalist'.[1] She suggests that 'instead of an end in itself, it is a means to an end.[2] That is, accountability is viewed as the means to remedy

[1] Danielle Hannah Rached, 'The Concept(s) of Accountability: Form in Search of Substance' (2016) 29 *Leiden Journal of International Law* 317, 334.
[2] Ibid.

the Security Council's various 'deficits'. In this sense, we can describe accountability as a 'solution concept'.[3] Clarification regarding the breadth and depth of the current accountability deficit is of paramount importance if we are to understand how the concept of accountability might apply to the Security Council's Chapter VII decision-making. In other words, if accountability is a 'solution concept', the purpose of this chapter is to clarify the problem at hand.

1. The Security Council and the Idea of Collective Security

Before dissecting the role of the Security Council within the United Nations Charter system, and its far-reaching powers therein, it is important to understand the Council in its historical context in order to appreciate how these powers came to be. Situating the Council vis-à-vis its historical predecessors reveals the fact that the former is a product of the flaws of the latter. Additionally, historical context also illustrates the teleological dimension of the Charter, the telos being the realisation of the notion of 'collective security'. As a preliminary definition, collective security can be defined as:

> [T]he proposition that aggressive and unlawful use of force by one nation against another will be met by the combined strength of all other nations. All will cooperate in controlling a disturber of the peace. They will act as one for all and all for one. Their combined strength will serve as a guarantee for the security of each.[4]

1.1. Historical Collective Security Antecedents

1.1.1. The Council of Europe

It is commonplace to suggest that the Security Council finds its 'genesis' in the League of Nations system of collective security. However, the Concert of Europe (1815-1914) had earlier set in place a number of the key principles which the contemporary system is built upon. The Concert of Europe was an alliance, formed after the Napoleonic wars, which brought together the major European powers in the aim to maintain peace through mutual control of power, and through combined action against any state which disturbed the peace.[5] It was built on the

[3] See, albeit in a different context, Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137, 158, who describes the rule of law as 'the concept of a solution to a problem we're not sure how to solve; and rival conceptions are rival proposals for solving it'.
[4] KP Sarkensa, *The United Nations and Collective Security* (DK Publishing House 1974) 4-5.
[5] Nicholas Tsagourias and Nigel D White, *Collective Security: Theory, Law and Practice* (Cambridge University Press 2013) 11.

loftiest of ideals. As Article 1 of its constitutive instrument articulated, members of the alliance, 'united by the bonds of true and indissoluble fraternity, and considering each other as fellow-countrymen', vowed 'on all occasions and in all places [to] lend each other aid and assistance.'[6] This spirit of 'fraternity' chimes with the idea of 'one for all and all for one' described above. In addition, the monopolisation, and centralisation, of mechanisms for the use of force also resonates with the current system. Finally, although the above definition speaks of 'the combined strength of *all nations*', the fact that the Concert of Europe in fact conferred the legitimate recourse to force to only the few, most powerful nations of the day, actually mirrors the same type of hegemony that we identify in the United Nations system.

The Concert of Europe was predestined to fail, however. A system built more on political expedience than any real ambition to reform the international legal order, for example by prohibiting recourse to war, the 'balance of power' served its purpose only until the strategic interests of the great powers determined otherwise. Hans Kelsen has suggested that 'by its very nature, collective security is a legal principle, while the balance of power is a principle of political convenience'.[7] The Concert of Europe was something of a hybrid system, in that it had been formalised in a treaty among its members, but it clearly cannot be defined as a truly collective security system as it was not a formal institutional arrangement, and it was not governed by law *per se.* The Concert had no permanent institutions, instead, *ad hoc* meetings were convened to deal with specific problems.[8] In addition, due to the lack of political unanimity between the great powers, the system itself was never transformed into a system that benefitted the international community. Orakhelashvili suggests that 'ad hoc concerts of power depend on accidental confluences of power and are unstable'.[9] Such instability manifested in the Concert's failure to prevent the catastrophe of the First World War.

1.1.2. The League of Nations

A defining element of the development of collective security arrangements is thus their increasing institutionalisation. As such, the United Nations Charter collective security system finds its roots more directly in the League of Nations (1919-1946). It is important to note,

[6] The Holy Alliance Treaty (Treaty between Austria, Prussia and Russia) (1815) (cited in ibid 12).
[7] Hans Kelsen, *Collective Security under International Law* (Naval War College International Law Series 49, 1954) 42.
[8] Tsagourias and White (n 5) 12.
[9] Alexander Orakhelashvili, *Collective Security* (Oxford University Press 2011) 9.

however, the extent that the League built upon, rather than replaced, the earlier Concert of Europe system.[10] Just as with the Concert, the committee that drafted the Leagues Covenant consisted of representatives of the five victor powers of the First World War (the United Kingdom, France, the United States, Italy and Japan).[11] As Inis Claude states, the League's founders saw 'the great powers as the predominant participants … They felt no sense of failure or inadequacy when they created a League which did not represent a fundamental alteration of the old system, since they regarded that system as basically sound and workable'.[12]

Article 11 of the League's Covenant declared that 'any war or threat of war, whether or not immediately affecting any Members' was a 'matter of concern to the whole League, and the League shall take action that may be deemed wise and effectual to safeguard the peace'. Article 16 stipulated that if any Member resorted to war in violation of the Covenant, it was '*ipso facto* deemed to have committed an act of war against all other Members'. The current institutional arrangement of the UN, which sees the Security Council at the heart of the collective security regime, finds its immediate lineage from Article 10 of the League Covenant which empowered the League's Council to advise member states on the means to be taken against acts of aggression or the threat of aggression. Article 16, like Chapter VII of the Charter, drew a line of distinction between economic sanctions and military action. Member states were duty bound to apply commercial and financial measures against an aggressor, but, insofar as military action was concerned, the League's Council was only entitled to make non-binding recommendations. This was, to Dinstein, the fatal flaw in the League of Nations system. Dinstein suggests that 'as long as an international organisation cannot obligate Member States to impose military sanctions against an armed attack, one cannot speak of a veritable collective security system.'[13]

It is worth mentioning, however, the League's additional Achilles heel. Although President Woodrow Wilson's idealism had been a driving force behind the establishment of the League in the after of the First World War, the United States policy of isolationism meant that ultimately it did not join the League. The Soviet Union was not permitted membership in 1919, and although it was later accepted in 1934 it was then expelled in 1939 after the invasion of

[10] Paul Kennedy, *Parliament of Man: The United Nations and the Quest for World Government* (Penguin 2007) 8.
[11] Ibid 8-9.
[12] Inis Claude Jr, *Swords into Plowshares: The Problems and Progress of International Organisation* (3rd edn, Random House, 1964) 54-55.
[13] Yorum Dinstein, *War, Aggression and Self Defence* (Cambridge University Press 2017) 329.

Finland. Without binding mechanisms for enforcement, the League was powerless to halt the onset of the Second World War, but it is safe to say its demise was already predetermined by its failure to incorporate several of the most powerful states.[14]

The League of Nations system was, therefore, not sufficiently robust to prevent the outbreak, and disastrous consequences, of the Second World War. However, even during the course of WWII, as early as August 1941, the United Kingdom and the United States recognised the necessity of establishing a 'permanent system of general security'.[15] By October 1943, at the Moscow Conference, they were joined by the USSR and China who also recognised 'the necessity of establishing … a general international organisation … for the maintenance of international peace and security.'[16] The catastrophe of two world wars in a quarter of a century had highlighted the manifest failure of leaving the security of the international community to individual sovereign states. According to this reading, the only real solution, building on the flaws of the League of Nations system, lay in vesting an international organisation with sufficient power to supersede state interests which jeopardised the security of the international community.[17]

1.2. The Security Council at the Apex of the UN Collective Security Regime

The intent of the United Nations Charter was to initiate a new global era whereby recourse to unilateral force is strictly prohibited, to be replaced by a system of collective security.[18] To Thomas Franck, 'recourse to such measures is to be the exclusive prerogative of the United Nations, acting in concert.'[19] The ideal of collective security is thus at the heart of the United

[14] In addition to the United States, the Allies had previously rejected German pleas to join the League until 1926, and in any event, Germany withdrew when Hitler took power in 1933. See, generally, Edward R Kantowicz, *The Rage of Nations* (William B Eerdmans Publishing Company 1999) 151-152.
[15] Atlantic Charter (1941) clause 7 (cited in Ben Atkinson Wortley (eds), *The United Nations: The First Ten Years* (Manchester University Press 1957) 19-20).
[16] Ibid.
[17] cf Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004) 154-155, who destabilises (and adds a realist account) to this otherwise fictitious tale about the 'common good'.
[18] UN Charter (1945), art 2(4): 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.
[19] Thomas M Franck, *Recourse to Force State Action against Threats and Armed Attacks* (Cambridge University Press 2002) 2.

Nations organisation and is codified in the preamble to the Charter.[20] In order to achieve the overall objective, to 'save succeeding generations from the scourge of war',[21] the first operative paragraph of the Charter states that:

> The Purposes of the United Nations are … [t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.[22]

It might be suggested that from this primary purpose of the United Nations, we can unearth the telos of the Organisation as a whole. Juxtaposed against the traditional characterisation of the international legal system – decentralised, essentially private in nature, with state sovereignty as the central organising principle – the concept of collective security introduces a 'public' dimension.[23] That is, 'collective security refers to *collective* action in response to a *collectively* identified threat'.[24]

Establishing the 'publicness' of collective security has a descriptive dimension, in that it draws our attention to the political association of states – indeed the archetypal public authorities in the international arena – but it also has a normative dimension, in that it illustrates that states have come together in order to realise a 'global public good'; that is, international peace and security.[25] It also speaks to an instructive dimension, to a way of doing things. As Orakhelashvili has observed, collective security is a '*public process* involving the identification of a threat and the selection of a response by relying on normative standards and transparent procedures, as opposed to mere political consensus within a selected group of states'.[26] The underlying rationale is that as individual states do not have the capacity to secure international peace and security independently, 'the intervention of a public authority is required' and, in doing so, the public authority acts on behalf of the constituency of all states.[27] Therefore, the 'institutional and normative configuration of the UN describes an organisation that is

[20] See, Christian Henderson, 'The Centrality of the Security Council in the Legal Regime Governing the Use of Force' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Council* (Edward Elgar 2013) 120, 122-128.
[21] Preamble, UN Charter (1945).
[22] Article 1(1), UN Charter (1945).
[23] Tsagourias and White (n 5) 20-21.
[24] Orakhelashvili, *Collective Security* (n 9) 4.
[25] Tsagourias and White (n 5) 20-21.
[26] Orakhelashvili (n 9) 6 (emphasis added).
[27] Tsagourias and White (n 5) 21.

autonomous and independent, geared towards its ultimate goal of international peace and security, which reveals the teleological and result-orientated disposition' of the collective security system as a whole.[28]

Ostensibly, the realisation of the ideal of collective security provides the teleological justification for vesting unrivalled legal power in the Security Council. This could be argued to be 'the *raison d'etre* underlying the creation of such a small organ for the purposes of collective security'.[29] In fact, the dual telos of collective security – the maintenance of international peace and security and the idea of states delegating power to an international public authority to secure this – is found in the wording of Article 24(1). For this reason, it is worth repeating:

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

Article 24 thus operationalises the UN's primary purpose of maintaining international peace and security as provided in Article 1(1), which, in turn, operationalises the teleological notion of collective security.[30] That said, like the Concert of Europe and the League of Nations before it, the Security Council does not represent the international community in its composition but reflects the geopolitical power structure of 1945. Its functional heritage can thus be set against claims to great power 'hegemony', which will be explored below.

2. The Character of the Security Council

2.1. Composition and Voting Procedure

Within the framework of a general, global organisation, there was clearly a perceived need amongst the drafters for a smaller, more robust, executive body. It would simply be much more

[28] Tsagourias and White (n 5) 20-21.
[29] Henderson (n 20) 123.
[30] Hans Kelsen, The Law of the United Nations: A Critical Analysis of its Fundamental Problems (Praeger 1950) 283; Anne Peters, 'Article 24' in B Simma, D-Erasmus Khan, G Nolte and A Paulus, *The Charter of the United Nations: A Commentary* (3rd edn, vol 1, Oxford University Press 2012) 761, 771; Kenneth Manusama, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality* (Martinus Nijhoff 2006) 32.

difficult for a larger forum of all member states, for example by acting through the General Assembly, to take decisions quickly and effectively. Member states confer significant powers to the Security Council 'in order to ensure prompt and effective action by the United Nations.[31] From this perspective, the Security Council was established as a dynamic institution that would act affirmatively in order to maintain international peace and security. This sentiment by then Secretary-General Boutros Boutros-Ghali was reflected in the *Agenda for Peace:*

> It is the essence of the concept of collective security as contained in the Charter that if peaceful means fail, *the measures provided in Chapter VII should be used,* on the decision of the Security Council, to maintain or restore international peace and security in the face of a 'threat to the peace, breach of the peace, or act of aggression'.[32]

However, while the Security Council acts 'on behalf' of the international community, the broader membership of the United Nations is not represented within the Council institutional structure itself. Article 23(1) of the Charter provides that the Security Council shall consist of fifteen members of whom five are permanent members (China, France, the Russian Federation, the United Kingdom and the United States).[33] The ten non-permanent members are elected for two-year cycles by the General Assembly. They are not immediately eligible for re-election.[34] In order to ensure a level of continuity, elections to the Security Council are staggered. Five states are elected each year following a process which requires a two-thirds majority rule. Article 23 which itself indicates that an 'equitable geographical distribution'[35] should be among the criteria to be applied in elections of non-permanent members. As such, seats are allocated according to the following formula: five from the Afro-Asian States, one from Eastern Europe, two from Latin America, two from Western Europe and other states.[36] However, equitable representation of non-permanent seats is mere window dressing when we consider the composition of the Council as a whole. The West is particularly over-represented. Western Europe and the United States collectively account for a comparably small share of the global

[31] Article 24(1), UN Charter (1945).
[32] 'An Agenda for Peace: Preventive Diplomacy, Peace-making and Peace-keeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992 (17 June 1992) UN Doc A/47/277–S/24111, para 42.
[33] See, 'Question of Equitable Representation on the Security Council and the Economic and Social Council', UNGA Res 1991 (XVIII) (17 December 1963) UN Doc A/RES/1991, para 1: using the formal process for amending the Charter under Article 108, the Security Council was enlarged from eleven to fifteen members
[34] Article 23(2), UN Charter (1945).
[35] Article 23, UN Charter (1945).
[36] UNGA Res 1991 (XVIII) (17 December 1963) UN Doc A/RES/1991(XVIII).

population, yet it holds one-third of all seats in the Council and sixty per cent of the permanent seats.[37]

The composition of the Council can be seen as something of a 'compromise between the more egalitarian instinct of the small and medium-sized nations and the claims to privilege of the powerful few – with the latter having the upper hand.[38] In this respect, the organisation was never truly established to be a universal body to represent the interests of the international community, but a *de facto* representation of the Great Powers of the day. The permanent members represent the major powers of 1945 and have historically enjoyed an exceptional status not only by virtue of their permanency but also by the procedural voting requirements laid down in the Charter. In accordance with Article 27(2) of the Charter, decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine out of the fifteen members, but paragraph 3 provides that 'decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members *including the concurring votes of the permanent members*'.[39]

Therefore, the permanent member veto power *prima facie* relates only to substantive matters. It would appear, therefore, that the distinction between procedural and substantive matters would take on an important meaning in this context. On the one hand, if the preliminary question was deemed a procedural question, a simple majority of Council member states (i.e. non-permanent member states) could then classify a substantive matter as a procedural one and thereby circumvent the rights of permanent members guaranteed under Article 27(3). On the other hand, applying Article 27(3) to the preliminary question opens the door for permanent members to undercut the rights of non-permanent members to decide a procedural question under the voting requirements of Article 27(2).[40] However, this question was put to rest in the formulation of the 'Yalta formula' proposed at the San Francisco conference, seemingly to

[37] Bart MJ Szewczyk, 'Variable Multipolarity and UN SC Reform' (2012) 53 *Harvard International Law Journal* 450, 457.
[38] Kennedy (n 10) 9.
[39] Article 27(3), UN Charter (1945) (emphasis added). This analysis is focussed on the conduct of the permanent members. Of course, non-permanent members of the Security Council also have the implicate capacity to hold the Security Council to account, if enough non-permanent members opposed a resolution that the measure did not attain the required nine votes for adoption, then they could effectively hold a veto power as well, see Article 27(1), UN Charter (1945). This has come to be known as the 'hidden veto'. See Loraine Sievers and Sam Daws, *The Procedure of the UN Security Council* (5th edn, Oxford University Press 2015) 317.
[40] Andreas R Zimmerman, 'Article 27' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus, *The Charter of the United Nations: A Commentary* (3rd edn, vol 1, Oxford University Press 2012) 871, 903.

assure that no loopholes were left to prevent the use of the veto.[41] Commonly referred to as the 'double veto', it was affirmed that any 'decision regarding the preliminary question as to whether or not such a matter is procedural must be taken by vote of [nine] members of the Security Council, *including the concurring votes of the permanent members'*.[42]

In practice, therefore, there is no formal difference between a procedural matter or otherwise. In order to rationalise this, the permanent members themselves developed an argument referred to as the 'chain of events' theory. Namely, any procedural matter, or pacific measures adopted against a state, may initiate a chain of events that might, in the end, require the Council under its responsibilities to invoke measures of enforcement.[43] However, as Nigel White argues, 'it did not appear necessary to allow the veto to occur at the pacific settlement stage as long as the permanent members could operate it at the enforcement stage.'[44] What is clear is that any permanent member sufficiently engaged in a matter has the power to veto any potential resolution relating to it. The 'chain of events' theory was merely a mechanism whereby the whole field of Security Council competence would be subject to the veto.[4546] As Ian Hurd notes:

> The proposals that the Great Powers brought to San Francisco had two qualities built into the design of the Council that set up the controversy to come: first: the Council was designed to institutionalise special rights for the Great Powers and to entrench those in international law; second, the Great Powers made it clear that no substantive changes were possible to this basic design.[47]

In truth, 'the Big Five decided to let it be known that unless the voting provision was accepted, there would be no Organisation.'

At face value, the exceptional status of the permanent membership does not sit comfortably with 'the principle of sovereignty equality of all its Members' upon which the organisation is

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[41] Nigel D White, *The Law of International Organisations* (Manchester University Press 2005) 8.
[42] Doc No 852, IJI/1/37(1), 11, 711-714 (emphasis added).
[43] Nigel D White, *The United Nations and the Maintenance of International Peace and Security* (Manchester University Press 1990) 8.
[44] Ibid.
[45] Ibid.
[46] Ruth B Russell and Jeannette E Muther, *A History of the United Nations Charter: The Role of the United States 1940-1945* (Brookings Institute 1958) 766.
[47] Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton University Press 2007) 109; see also, Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004).

based.[48] The veto power represents a prejudice inherent in the Security Council concerning its assessment of the different capacities of large versus small states, whereby larger, more powerful, states are not sufficiently accountable to smaller states (particularly developing states). To Paul Kennedy, the veto, as formulated, was deliberately designed to 'weaken certain universalistic principles and compromise the effective response to possible transgressions of international law where a large nation was involved, but that was a lot better than no security system at all'.[49]

The permanent member veto might be explained, or rationalised, from one of at least three different perspectives. The first is realist in nature. Some have argued that there is a practical basis for this preferential treatment, based on Jessup's analogy of the 'inescapable fact of power differentials'.[50] While smaller states objected on the grounds that this conflicted with the principle of the sovereign equality of states,[51] on this point they had to yield because it was clear that the provision was a *sine qua non* of membership for the great powers.[52] As White notes, 'it is realistic to state that without the power of the veto the Organisation would probably not have been born'.[53] Whether one regards the necessity of Great Power unanimity as an idealistic attempt to codify the collective security ideal, or more cynically as a recognition that any international legal order would (perhaps paradoxically) be forced to recognise Great Power interests as paramount to collective interests.

The second perspective is based on the presumption that it was always assumed that the main responsibility for the maintenance of international peace and security would rest on these five states. The conclusion drawn was that 'power must rest where responsibility lies'.[54] Considering the permanent members would be expected to contribute the most resources, be that financial, military or human, to any enforcement action, there is a compelling argument that permanent member states should be entitled to a greater level of involvement in the process, and possibly the right to veto such a decision. To a certain extent, this principle holds in practice. The United States, for example, contribute 22 per cent of the overall budget of the

[48] Article 2(1), UN Charter (1945).
[49] Kennedy (n 10) 28.
[50] See, eg, Wortley (n 15) 21.
[51] UN Charter (1945), art 2(1): 'The Organization is based on the principle of the sovereign equality of all its Members'.
[52] Richard Hiscocks, *The Security Council: A Study in Adolescence* (Longman 1973) 54.
[53] Ibid, at 5.
[54] Wortley (n 15) 21.

United Nations.[55] While the other permanent members certainly make significant contributions, China contributes 7.9 per cent, France 4.9 per cent, UK 4.7 per cent and Russia 3.1 per cent respectively. However, the contributions of Japan (9.7 per cent) and Germany (6.4 per cent) certainly stand out as non-permanent members of the Council.[56] However, against other metrics, the argument would appear less sustainable. The highest troop and police contributors to peacekeeping operations – Ethiopia, Bangladesh, Rwanda, India and Pakistan – are, of course, not permanent members of the Council.[57]

From a third perspective, and again as a matter of practicality, the veto power had its genesis in the desire to prevent permanent members from being the potential object of collective measures.[58] In the words of White again, even if the creation of a collective security system unencumbered by the permanent member veto was a realistic proposition, 'it would not have been able to take enforcement action against the Great Powers, particularly the Soviet Union and the United States, without devastating effects.'[59]

2.2. The UN Security Council and Hegemony

In evocative terms, José Alvarez has described 'the emerging imperial Global States',[60] and suggests that Security Council decisions are 'nothing more than U.S. imperial ambitions "laundered" by law … "blue-washed" through the (mis)use of the United Nations'.[61] In this light, the composition of the Security Council might be said to reproduce the hierarchies already built into the international legal system, where the 'Good West' is pitted against the

[55] UN Secretariat, 'Assessment of Member States' Advances to the Working Capital Fund for the Biennium 2018–2019 and Contributions to the United Nations Regular Budget for 2018' (29 December 2017) UN Doc ST/ADM/SER.B/973, 12. The contributions of the United Nations should of course be understood in the context of President Trump's recent threats to cut contributions to international organisations generally, and the UN in particular. See, eg, 'US to make at least $285m cut to UN budget after vote on Jerusalem' (26 December 2017) *The Guardian* https://www.theguardian.com/world/2017/dec/26/us-to-make-at-least-285m-cut-to-un-budget-after-vote-on-jerusalem

[56] Ibid 8-12.

[57] United Nations Peacekeeping, 'Troop and Police Contributors' <https://peacekeeping.un.org/en/troop-and-police-contributors>

[58] See, generally, White (n 43) 7-9.

[59] Ibid.

[60] BS Chimni, 'A Just World under Law: A View from the South' (2007) 2(2) *American University International Law Review* 199, 207.

[61] José E Alvarez, 'Contemporary International Law: An 'Empire of Law' or the 'Law of Empire'' (2009) 24(5) *American University International Law Review* 811, 824; Ian Hurd, 'The UN Security Council' in Alexandra Gheciu and William C Wohlforth (eds), *Oxford Handbook of International Security* (Oxford University Press 2018) : 'With the legal powers of Leviathan and the political interests of the Great Powers, the Security Council is an imperial super-sovereign'.

'Bad Rest'. The discourse stands to reproduce the binary dichotomy that ruptures the international sphere into two conceptual communities, one 'heavenly' and the other 'hellish'.[62] This reinforces what has been referred to as the 'one-way traffic paradigm'. According to this paradigm, 'knowledge, scrutiny and supervision' of international law tends to flow from the West to the Third World.[63] However, a similar logic surely holds in the context of collective security. Kennedy conveys an interesting analogy in that smaller, militarily weaker countries can be viewed as the 'consumers' of collective security.[64] They comparatively lack the demographic, territorial or economic resources to resist the use of force by larger neighbours. While such an act would *de facto* be a violation of the prohibition of the use of force in international law,[65] any enforcement action relies on the authorisation of the Security Council, which in turn relies on the affirmative vote of its permanent members. The larger powers are therefore in contrast perceived as the 'providers' of collective security.[66] In turn, this resonates with Antony Anghie's examination of the relationship between international law and colonialism by focusing on what he has called 'the civilizing mission'. That is, 'the grand project that has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe'.[67]

The composition and voting procedures of the Council can certainly be criticised, not least in the context of an organisation ostensibly based on the sovereign equality of its members. Richard Falk has reasoned that the United Nations was structured from the outset to be 'a universal instrument of geopolitics, rather than a creature of law … or an institution that acted on the basis of what a majority of Member States favoured'.[68] Advocating a functional

[62] See, further, David Slater, 'Contesting Occidental Visions of the Global: The Geopolitics of Theory and North-South Relations' (1994) 4 *Beyond Law* 97, 100–101.
[63] Obiora Chinedu Okafor, International Human Rights Fact-Finding Praxis in its Living Forms: A TWAIL Perspective' (2014) 1 *The Transnational Human Rights Review* 59, 67.
[64] Kennedy (n 10) 28.
[65] Article 2(4), UN Charter (1945) states that: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence'. The ICJ has proclaimed that Article 2(4) is a cornerstone of the UN Charter. *Case Concerning Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda* (Judgment) [2005] ICJ Rep 168, at para 148. States and commentators generally agree that the prohibition is not only a treaty obligation but also customary international law and even *jus cogens*. *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits) [1986] ICJ Rep 14, at para 190.
[66] Ibid.
[67] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 3.
[68] Richard Falk, 'The United Nations and the Rule of Law' (1994) 4 *Transnational Law and Contemporary Problems* 611 625.

perspective in relation to the Charter could particularly be charged with the manifestation of the 'imperial gaze'.[69] The power allocation in the Security Council was established as reflecting the distribution of political power at the end of the Second World War. It is thus tantamount to the institutionalisation of 'victor's justice'. Philip Allott has suggested that these arrangements amount to the establishment of an 'international aristocracy', which creates the groundwork for an international 'oligarchy of oligarchies'.[70]

This critique resonates with Third World Approaches to International Law. Although it is important to emphasise the diversity within third-world perspectives, the approach is in a sense unified by:

> A shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust global order ... a commitment to centre the *rest* rather than merely the *west*, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case.[71]

Most associated with the work of Antony Anghie, Makua Matua, and BS Chimni, Third World Approaches are justifiably sceptical of the 'universal' credentials of the Security Council.[72] Through a counterhegemonic lens, this approach 'regards the structure of the United Nations, and in particular its Security Council, as completely indefensible'.[73] Matua argues that 'ostensibly, the United Nations was the neutral, universal and fair guardian of the new order. But in reality, European hegemony over global affairs was simply transferred to the big power'.[74] The concept of hegemony relates to the practice of conferring special rights and responsibilities on those with the capacity to lead. It 'connotes the domination of the weak by the strong, the many by the few. It implies the institutionalization of privilege, consequent

[69] Christine EJ Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff 2011) 101.
[70] Philip Allott, 'The Emerging International Aristocracy' (2003) 35 *New York University Journal of International Law and Politics* 310, 336.
[71] Obiora Chinedu Okafor, 'Newness, Imperialism and International Legal Reform in our Time: A TWAIL Perspective' (2005) 43 *Osgoode Hall Law Journal* 171, 176 (emphasis in original). See further, Makau Mutua, 'What is TWAIL?' (2000) 94 *Proceedings of the American Society of International Law* 31.
[72] See, eg, Anghie (n 67); BS Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15(1) *European Journal of International Law* 1; see, further, Makau Mutua, 'Critical Race Theory and International Law: The View of an Insider-Outsider' (2000) 45 *Villanova Law Review* 841, 851: 'Today the U.N. Security Council and its indefensible structure has become the exclusive property of the United States, Britain and France'.
[73] Matua (n 71) 34.
[74] Ibid.

inequality in the distributions of various values, and the injustices inherent in inequality'.[75] In this sense, the position of the permanent members has been described as 'giving expression to the legalized hegemony of the great powers'.[76] Hurd points to two forms of hegemonic power, both of which are at play in the Security Council: 'the power states get from associating themselves with the legitimacy of the Council and the power the Council gets from controlling the terms of that association'.[77] According to Hurd, far from replacing power politics, 'the Council changes the context of power politics by institutionalizing it'.[78] This is further illustrated by the institutional primacy which the Charter affords to the Security Council over the General Assembly. This would seem to vindicate the hegemonic critique as the plenary organ of the United Nations is dominated by Third Word states.[79]

Indeed, the General Assembly is vested (subsidiary) powers in the field of peace and security, the Assembly may consider 'the general principles of co-operation in the maintenance of international peace and security'[80] or 'discuss any questions relating to the maintenance of international peace and security brought before it'.[81] However, so long as the Security Council is 'exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation so requests.'[82] Further, both the General Assembly[83] and the United Nations Secretary-General[84] are able to bring to the attention of the Security Council situations that may threaten or endanger international peace and security. Having said that, given that it is precisely the Security Council who receives these recommendations, under the provisions of the Charter the body was clearly envisaged as the most significant organ in the remit of international peace and security.[85] The role of the General Assembly was expressly defined as being subordinate to the Security Council in the institutional hierarchy of the United Nations system.

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[75] Donald J Puchala, 'World Hegemony and the United Nations' (2005) 7(4) *International Studies Review* 571, 571.
[76] Ian Clark, *Legitimacy in International Society* (Oxford University Press 2005) 150.
[77] Ian Hurd (n 47) 132-133.
[78] Ibid; see, in a similar vein, Mutua, 'What is TWAIL' (n 71) 34: 'The United Nations … simply changed the form of European hegemony, not its substance'.
[79] Ibid.
[80] Article 11(1), UN Charter (1945).
[81] Article 11(2), UN Charter (1945).
[82] Article 12 (1), UN Charter (1945).
[83] Article 11 (3), UN Charter (1945).
[84] Article 99, UN Charter (1945).
[85] Henderson (n 20) 124.

The Security Council's dominance also manifests in a number of other ways. Member states 'agree that in carrying out its duties … the Security Council acts on their behalf.'[86] Thus, while the Security Council is a political organ, it produces resolutions having legal consequences.[87] In contrast to the General Assembly, which has the power to make 'appropriate recommendations'[88], the Security Council possesses the exclusive power to adopt legally binding decisions of general applicability on all member states.[89] This is reinforced by Article 2(5), which requires members states to 'give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action'. Furthermore, decisions of the Security Council are binding even if they conflict with another legal obligation incumbent upon states. By virtue of Article 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. It is worth clarifying that 'obligations' for the purposes of Article 103 include those stated in the Charter as well as those flowing from binding Council decisions.[90]

3. Enforcement Powers under Chapter VII of the UN Charter

3.1. Article 39 as Gateway Provision

Chapter VII and Chapter VIII of the Charter lay out the enforcement measures available to the Security Council in order to fully carry out its responsibility to maintain international peace and security.[91] The first provision of Chapter VII, Article 39, introduces the coercive powers of the Council and introduces a two-step process:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression *and* shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.[92]

[86] Article 24(1), UN Charter (1945).
[87] Marc Perrin De Brichambaut, 'The Role of the United Nations Security Council in the International Legal System' in Michael Byers (ed), *The Role of Law in International Politics* (Oxford University Press 2000) 269.
[88] Article 11(1), UN Charter (1945).
[89] Article 25, UN Charter (1945).
[90] Peters (n 30) 850.
[91] Chapter VIII concerns regional arrangements and is deemed to be outside the scope of this thesis.
[92] Article 39, UN Charter (1945) (emphasis added).

It is commonly understood that the Security Council enjoys broad discretion in its interpretation of its obligations under the Charter. Supporters of this assertion point to the fact that the terms 'threat to the peace', 'breach of the peace' or 'act of aggression' are not defined anywhere in the Charter.[93] At San Francisco, proposals to distinguish between a threat to the peace, which resulted from the failure to arrive at a peaceful settlement of a particular dispute, and the presence of a general threat to the peace, breach of the peace or act of aggression, were abandoned. It would seem that this was primarily in order to ensure that the broad discretion of the Security Council was not unduly restricted.[94] It has been submitted that the determination that one of the above situations has occurred is a judgement based on factual finding and the weighing of political considerations which should not be measured by legal criteria.[95] Clearly, the structural bias in favour of the permanent members of the Security Council indicates that decisions in the interest of peace and security will be based primarily on political considerations, and at that, the considerations of the permanent members hold considerable sway. The Security Council has, instead, 'maintained that it is the master of its own agenda'.[96] In fulfilling its collective security mandate Article 42 provides the Security Council the ultimate power to enact forceful enforcement measures; therefore the circumstances in which it is invoked should be subjected to close scrutiny.

The scope of discretion bestowed upon the Security Council raises significant accountability issues. The broad discretionary scope ordained to the Council derives from the fact that there is no definition for what constitutes a 'threat to international peace and security' to be found in either the Charter or the practice of the United Nations since its creation in 1945.[97] As Reisman argues, the collective security regime was intended to operate according to the will and discretion of the permanent members of the Security Council. In fact, there is weight to the

[93] Vera Gowland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 International and Comparative Law Quarterly 55, 60; De Wet, 135.
[94] Erika de Wet, *Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) 135. It is noteworthy that even the attempt to provide the Council with objective criteria in the General Assembly's definition of aggression is stated as not intended to prejudice or hamper the wide discretion which the Council has in the matter: UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314(XXIX) arts 4 and 6.
[95] See, eg, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States)* (Provisional Measures) [1992] ICJ Rep 114 (separate Opinion of Judge Weeramantry), at para 176.
[96] Leland M Goodrich and Edvard Hambro, *Charter of the United Nations – Commentary and Documents* (World Peace Foundation 1949) 250.
[97] Marc Perrin De Brichambaut, 'The Role of the United Nations Security Council in the International Legal Sysrem' in Michael Byers (ed), *The Role of Law in International Politics* (Oxford University Press 2000) 269.

argument that 'nowhere is the Security Council under less strictures than in its determination that a threat to the peace exists.'[98] Concurring, White suggests that 'if the keys that unlock the collective security procedures and machinery are simply political ones then law will struggle to play a profound role in this area'.[99]

A determination of a threat to the peace is not based on any tangible objective criteria. It is not, for example, contingent on any past, present or future use of force.[100] The expression 'threat to the peace' is deemed elastic enough to stretch away from a contemplated use of force and beyond inter-state relations.[101] The Security Council, in fact, is not even obliged to make reference to a specific violation of international law to which they are responding.[102] The determination is in effect a political decision and not a legal one.[103] In short, 'it is completely within the discretion of the Security Council to decide what constitutes a 'threat to the peace'.[104] Dinstein notes, 'a threat to the peace is not necessarily a state of facts: it can be merely a state of mind; and the mind that counts is that of the Security Council.'[105] In this context, Richard Lillich is not too far from the truth when he remarks, 'the Charter is what (in this case) the Security Council says it is'.[106]

The purpose of Security Council authorised enforcement action, we are classically told, 'is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law.'[107] Such an understanding is dangerous when interpreted thus:

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[98] Dinstein (n 13) 309. See further, Kelsen, 'Law of the UN' (n 30) 727; WM Reisman (1993) 18 YJIL 418.
[99] Nigel D White, 'On the Brink of Lawlessness: The State of Collective Security Law' (2002) 13(1) Indiana International and Comparative Law Review 237, 238
[100] Cf. Article 51, UN Charter (1945), contrasting this broad discretionary power, individual or collective self-defence is allowed only '*if an armed attack occurs* against a Member of the United Nations' (emphasis added).
[101] See, Benedetto Conforti, *The Law and Practice of the United Nations* (2nd edn, Martinus Nijhoff 2000) 173.
[102] Dinstein (n 13) 310.
[103] Kelsen, *Law of the UN* (n 30) xvi, suggests that any disagreement between the meanings (interpretations) allowed is an unchallengeable political decision.
[104] Ibid 727.
[105] Dinstein (n 13) 310.
[106] Richard B Lillich, 'Humanitarian Intervention through the United Nations: Towards the Development of Criteria' (1993) 53 *Heidelberg Journal of International Law 557*, 564.
[107] Hans Kelsen, *Law of the UN* (n 30) 294. For an alternative view, see Vera Gowland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 ICLQ 55. Gowland-Debbas examines the Security Council's role in the enforcement of international obligations from the framework of analysis provided by the doctrine of State Responsibility. Her central point is that the Security Council has become increasingly involved in the enforcement of international law (e.g. the establishment under Chapter VII of Tribunals for the Enforcement of Humanitarian Law in the former Yugoslavia and Rwanda). However, it is not clear that this signifies that the Security Council's primary function has become that of an international law enforcement agency. On this point, see TD Gill, 'Legal and some political limitations on the power of the UN Security Council to exercise its enforcement powers under Chapter VII of the Charter' (1995) 26 *Netherlands Yearbook of*

> The Security Council has the power to take enforcement actions even in case no obligation expressly imposed on the members has been violated, provided that the Security Council considers such action necessary for the maintenance of international peace and security.[108]

This is inherently problematic, for as Dinstein notes, the Council can go as far 'upstream' as it likes in identifying a threat to the peace.[109] Indeed, in the absence of a wholly objective examination of what constitutes a threat to the peace, a subjective test is the only available alternative. The Security Council has, for example, been described as a 'law unto itself', which displays 'opportunistic flexibility'.[110] It follows, therefore, that the Security Council has the power to stigmatise as a threat to the peace a situation which does not appear from an objective standpoint to be disturbing the equilibrium of international security. But it is offered that the ramifications for the international legal order are more pronounced when the Security Council 'down-streams' in its identification of a threat to the peace. There are various examples from Security Council practice whereby a situation quite clearly disturbs the equilibrium of international security and the Council does not, or closer to the truth cannot - due to political deadlock among the permanent membership - make a determination under Article 39 and recommend enforcement measures. In these cases, no reasons are required to be given for such a determination, even though it might appear arbitrary for the Council to do so.[111]

Franck argues that the meaning of 'threat to the peace', 'breach of the peace' and 'act of aggression' 'is gradually being redefined experientially and situationally.'[112] Franck takes the positive view that the 'global system is responding … to new facts and threats that are redefining the threshold of what is seen to constitute a threat to the peace, requiring a powerful collective response'.[113] This would seem to be an overly utopian viewpoint. To (re)define is to describe exactly the nature, scope, or meaning of the object of analysis. It is contended that Security Council practice is so inconsistent that it is oxymoronic to speak of a 'definition' of

International Law 33, 33, who states that 'the enforcement activities of the Council are adjective to its primary function as a collective security organ'.
[108] Kelsen, 'Collective Security' (n 7) 788.
[109] Dinstein (n 13) 310.
[110] José E Alvarez, 'Judging the Security Council' (1996) 90 *American Journal of International Law* 1, 2.
[111] Henderson (n 20) 125.
[112] Franck (n 19) 44.
[113] Ibid.

the situations that would require an Article 39 determination when the record of the Security Council remains so inconsistent.

Indeed, in its subsequent practice, it can be noted that the Security Council has been extremely reluctant to find that there has been an act of aggression; it has done so only with regard to Israel,[114] South Africa[115] and Rhodesia.[116] Even on these occasions, the phrase 'act of aggression' appeared descriptively and the Security Council has thus never made a formal finding that 'aggression' in the sense of Article 39 has occurred. However, it is not imperative for the Security Council to determine specifically the categorisation that has occurred. There is no practical consequence to specific labelling; it is accepted that the powers of the Council remain identical, as long as the situation can be categorised by the Security Council under one of the three broad headings.[117] In addition, it seems clear from the practice of the Security Council that no express reference to Article 39 is required for action under Chapter VII, the use of the language of Article 39 more broadly is sufficient.[118] However, such broad language would seem to be, at the very least, necessary for the Security Council to become seized of the matter, and to provide the trigger for enforcement measures under Chapter VII.[119] Absent a formal determination of a threat to the peace or act of aggression, any allusion by the Security Council should be dismissed as a non-binding locution.[120] That being said, once such a determination is made, 'the door is automatically opened to enforcement measures of a non-military or military kind'.[121]

[114] UNSC Res 573 (4 October 1985) UN Doc S/RES/573 and UNSC Res 611 (25 April 1988) UN Doc S/RES/611 (against Tunisia).
[115] UNSC Res 387 (31 March 1976) UN Doc S/RES/387; UNSC Res 567 (20 June 1985) UN Doc S/RES/567); UNSC Res 568 (21 June 1985) UNSC Res 571 (20 September 1985) UN Doc S/RES/571; UNSC Res 574 (7 October 1985) UN Doc S/RES/574; UNSC Res 577 (6 December 1985) UN Doc S/RES/577 (against Angola); and UN Doc S/RES/568 (against Botswana).
[116] UNSC Res 455 (23 November 1979) UN Doc S/RES/455 (against Zambia).
[117] Dinstein (n 13) 137. See, further, chapter 4, section 2.1.
[118] Freudenschuβ, 'Article 39 of the UN Charter Revisited: Threats to the Peace and Recent Practice of the UN Security Council' (1993) 46 *Austrian Journal of Public and International Law* 1; see, also, Sydney D Bailey and Sam Daws, *The Procedure of the Security Council* (3rd edn, Clarendon Press 1998) 271.
[119] Vera Gowlland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 International and Comparative Law Quarterly 55, 61; Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press 1994) 612-13.
[120] Dinstein (n 13) 319.
[121] Inger Osterdahl, *Threats to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter* (Och Justus Forlag 1998) 28. Note that Security Council competency is not limited to enforcement measures, Article 40 of the Charter provides that '[I]n order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable.' This thesis is concerned however with enforcement measures.

3.2. Forcible and Non-Forcible Measures

Non-military measures, pursuant to Article 41, may include 'complete or partial interruption of economic relations and of rail, sea, air, postal telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'[122] The list of measures enumerated in Article 41 is not exhaustive, but none of the steps taken under this provision involves the use of force.[123] Conceptually, Article 41 of the Charter may be viewed as an outgrowth of the Covenant of the League of Nations, however there is one principle departure from the Covenant: if the Security Council decides that non-military measures would be, or have proven inadequate, it may, pursuant to Article 42, 'take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. At the San Francisco conference, the US delegation described the Security Council's involvement with crises as a process of graduated stages justifying the Council's intervention to the extent necessary.[124] However, there is no obligation for the Council to formally progress through the stages, this is a matter of discretion.

3.3. The Absence of Article 43 Arrangements: How Collective is Collective Security?

Of pivotal importance as an illustration of the collective security system as envisaged by the framers, Article 43 of the Charter provides that:

> All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.[125]

Furthermore, a 'Military Staff Committee', made up of the Chiefs of Staff of the permanent members of the Council,[126] was to be established, 'to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security', including 'the employment and command of forces placed at

[122] Article 41, UN Charter (1945).
[123] Dinstein (n 13) 307.
[124] See, generally, Alexander Orakhelashvili, *Collective Security* (Oxford University Press 2011) 26.
[125] Article 43, UN Charter (1945).
[126] UN Charter (1945), art 47(2).

its disposal'.[127] The Committee was to be 'responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council'.[128] The Charter thus clearly envisaged forces being at the disposal of the Security Council exclusively in the context of enforcement operations.[129] There was an understanding among governments at the San Francisco Conference and many subsequent commentators that Article 43 arrangements were a condition precedent to the authorisation of collective military measures by the Security Council.[130]

However, one of the consequences of the Cold War was, almost immediately, the death of the making of 'special arrangements' under Article 43. The Security Council 'to this day has never possessed any of the forces at its disposal that was initially envisaged'.[131] In July 1948, the Committee reported to the Security Council that it was unable to complete the mandate given to it two years previously.[132] The Military Staff Committee, today, remains 'little more than a curiosity.'[133] What is perhaps more curious is that the Committee has not been disbanded altogether. There have been occasional proposals to reinvigorate the Committee in an attempt to promote agreements under Article 43.[134] In his *Agenda for Peace*, then Secretary General Boutros Boutros-Ghali recommended that the Security Council, supported by the Military Staff Committee, 'initiate negotiations' towards Article 43 agreements.[135] It was accepted in the *Supplement to the Agenda for Peace*, nevertheless, that this objective was merely 'desirable in the long term' and that to attempt to do so at present would be 'folly'.[136] Meetings are presently reported to last a couple of minutes.[137]

[127] UN Charter (1945), art 47(1).
[128] UN Charter (1945), art 47(3).
[129] See, generally, Adam Roberts, 'Proposals for UN Standing Forces: A Critical History' in Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press 2008).
[130] Simon Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (Oxford University Press 2001) 166; Kelsen (n 30) 756. See, for further evidence, Article 106, UN Charter (1945), which provides for transitional security arrangements 'pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin to exercise of its responsibilities under Article 42.'
[131] Henderson (n 20) 130.
[132] Bailey and Daws (n 118) 280.
[133] Chesterman (n 130) 171.
[134] See, eg, UNGA Res 2734 (XXV) (1970).
[135] Report of the Secretary-General, 'An Agenda for Peace: Preventive Diplomacy, Peace-making and Peace-Keeping' (1992) UN Doc A/47/277-S/24111, at paras 20-1.
[136] Security Council 'Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations' (1995) UN Doc A/50/60-S/1995/1, at paras 77-80.
[137] Ibid.

In the absence of Article 43 agreements, a 'franchise model' of delegated enforcement action, has developed. [138] The franchise model was first used in relation to North Korea's invasion of South Korea in 1950. Having 'determined that the armed attack upon the Republic of Korea by forces from North Korea constitutes a breach of the peace',[139] the Security Council clearly did not have the required forces at its disposal to actually enforce its determination. Instead, the Council could only 'recommend that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area'.[140] This has proved controversial considering that this method is not explicitly mentioned in the Charter.[141] It has been described as a 'half-way house' between unilateral recourse to force and collective security as laid down in the Charter.[142] It certainly gives cause to question the 'collective' nature of collective security, given that this method 'eschew[s] direct UN responsibility and accountability for the military force'.[143] Initially, the method was also criticised by some smaller member states, as a use of 'military force in total disregard of the procedures established by the Charter'.[144]

It is true, however, that even under Article 43, any action was to be taken 'by all of the Members … or by some of them',[145] thus pre-empting the 'coalitions of the willing' that implement authorisations to use force in contemporary practice. Nevertheless, in the absence of specific arrangements under Article 43, the precise legal basis of the practice remains ambiguous. It has been argued that Article 48 of the Charter allows the Council to delegate Chapter VII powers. Article 48 states: 'The action required to carry out the decisions of the Security Council … shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine'. According to Bryde, this provision 'aims at flexibility in the

[138] Thomas M Franck, 'The United Nations as Guarantor of International Peace and Security: Past, Present and Future', in Christian Tomuschat (ed), *The United Nations at Age Fifty – A Legal Perspective* (Kluwer Law International 1995) 25, 31-33.
[139] UNSC Res 83 (27 June 1950) UN Doc S/RES/83.
[140] Ibid.
[141] With the exception of enforcement action undertaken by regional arrangements or agencies. Cf UN Charter (1945), art 53(1).
[142] Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"' (2000) 11(3) *European Journal of International Law* 541, 543; see, further, Helmut Freudenschuβ, 'Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council' (1994) 5 *European Journal of International Law* 492.
[143] Blokker (n 142) 544.
[144] UNSC Provisional Record, (29 November 1990) UN Doc S/PV.2963 (Malmierca Peolo, representative of Cuba) at 58.
[145] UN Charter (1945), art 48(1).

execution of enforcement measures'.[146] However, this provision refers only to the *execution* of decisions of the Council. The competence of the Council to make the decision in question must be found in another source. Its effect is no more than to restate the obligation on members to implement decisions of the Council. Neither can the model be gleaned from the wording of Article 42.

The better view is to accept that the Charter itself does not provide this power explicitly but that the Council has an implied power to delegate power to member states.[147] This view is based on an 'effective' interpretation of the Charter. Blokker shows that such a conclusion is valid irrespective of whether a broader, or more restrictive, interpretation of the doctrine of implied powers is adopted.[148] If a broad interpretation is taken, it is difficult not to conclude that the Council is empowered to adopt such resolutions. Without such powers, the Council is left impotent regarding the functions assigned to it by the member states. However, this is also true if a narrow interpretation of implied powers is used. The Security Council has the explicit power to take military enforcement action. If this power cannot be exercised in the absence of the necessary means, the Council is permitted to employ other, implied powers so as to enable the organization to carry out its tasks. In the words of the International Court of Justice in its *Certain Expenses* Advisory Opinion, 'it cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded, demonstrated this narrower interpretation'.[149] This flexibility has been confirmed by Security Council practice. There appears to be no basis in the text of Article 42 or in the *travaux preparatoires* for assuming that the provision can be applied only in the circumstances laid down in Articles 43.[150] It is now accepted that agreements under Article 43 are not a pre-requisite to enforcement action under Article 42, but it is fair to say that they would be a pre-requisite to the ability legally to compel participation by member states at large.[151]

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[146] Brun-Otto Bryde, 'Article 48' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press 1994) 651, 653.
[147] Freudenschuβ (n 142) 526; Chesterman (n 130) 165
[148] Blokker (n 142) 547-549.
[149] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, at para 167.
[150] For an early conclusion to this effect, see, Finn Seyersted, 'United Nations Forces—Some Legal Problems' (1961) 37 *British Yearbook of International Law* 351 438-9 and 463-4.
[151] Simon Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (Oxford University Press 2001) 166; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1994) 174, and 261.

While legality is not, therefore, necessarily an issue, the delegated method gives rise to a specific subset of questions relating to accountability. The result is an international collective security system, which is increasingly fragmented. Security Council resolutions delegating its enforcement powers to states or regional arrangements uniformly use the term 'authorise'. However, this term is misleading. Even in instances when the Security Council successfully recommends enforcement action, the implementation is not unified.[152] As White has observed, 'at the moment the Security Council has not yet 'decided' to use military force, it has simply recommended or authorised that States, on a voluntary basis, use force in particular situations and for particular purposes'.[153] An authorisation implies the conferring of a limited power to exercise a specific function, delegation in this context denotes a much broader discretion to use enforcement powers.[154] This is an important distinction to maintain, even if it is not clear in formal terms.[155] There are problems with relying on a system of volunteers to uphold collective security ideals, not least the problem of inconsistency. Acts of aggression, or breaches or threats to the peace, will only be met with enforcement measures when there are volunteers to be found. States will generally only volunteer when politically motivated.[156] However, the flip-side of this is also true. The non-use of Article 43 does potentially provide an important limitation on the Council's power to apply force under Article 42. Indeed, such application today 'can only be carried out with *ad hoc* troops provided voluntarily'.[157] Thus, the consent of member states potentially provides an important accountability mechanism.

4. Accountability Deficits: A Typology

[152] See, Chesterman (n 130) 165.
[153] Nigel D White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (Manchester University Press 1997) 119.
[154] Chesterman (n 130) 165.
[155] Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Clarendon Press 1999) 13.
[156] However, it might be said that this state of affairs is not dissimilar to the development of international law more generally. It is accepted widely that the *bona fide* rules of international law enjoy a widespread acceptance simply because they coincide with the interests of the aggregate of States. If states interests did not coincide, at times, with collective interests, rules would never have become international rules in the first place. See, generally, Anthony D'Amato, 'The Coerciveness of International Law' (2009) 52 *German Yearbook of International Law* 437.
[157] David Schweigman, *Authority of the Security Council under Chapter VII: Legal Limits and the Role of the International Court of Justice* (Martinus Nijhoff 2001) 40: Indeed, as Article 43(3) holds that special arrangement for the contribution of troops 'shall be subject to ratification by the signatory states in accordance with their respective constitutional processes … the same holds true *mutalis mutandis* for providing troops pursuant to a request made by the Council under Article 42'.

4.1. Illegality

In January 1992, the Security Council met for the first time at the level of heads of state and government. In the Presidential Statement that followed, members of the Council noted the 'new favourable international circumstances under which the Security Council has begun to fulfil more effectively its primary responsibility for the maintenance of international peace and security'.[158] In an oft-quoted statement, the Council claimed that the 'absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security'.[159] The subsequent reinvigoration, and innovation, of the Council, has triggered certain practices which have led certain commentators to question whether the Council has flirted with the boundaries of its constitutional competences. It has controversially used its Chapter VII powers to, *inter alia*, create international criminal tribunals[160] and other judicial organs,[161] to demarcate territorial boundaries,[162] to decide on the international responsibility of member states in a quasi-judicial manner,[163] and purportedly even to 'legislate' for all member states.[164] The following section will identify a number of specific issues relating to the Council's invocation of enforcement measures under Articles 41 and 42 respectively.

4.1.1. Non-forcible Measures

From its inception through the Cold War, the Security Council invoked its power to sanction sparingly. The first time the Security Council took economic measures under Article 41 was against Rhodesia after the Smith regime declared independence of the United Kingdom in order

[158] 'Note by the President of the Security Council' (31 January 1992) UN Doc S/23500, at 2.
[159] 'Note by the President of the Security Council' (31 January 1992) UN Doc S/23500, at 3.
[160] See, UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY)); UNSC Res 955 (8 November 1994) UN Doc S/RES/955 (establishing the International Criminal Tribunal for Rwanda.
[161] See eg, UNSC Res 687 (8 April 1991) UN Doc S/RES/687, para 16 (the Council effectively determined Iraq's international responsibility for the invasion of Kuwait).
[162] See UNSC Res 687 (8 April 1991) UN Doc S/RES/687, paras 244 (the Council pronounced, under Chapter VII, on the boundary between Iraq and Kuwait).
[163] See eg, UNSC Res 687 (8 April 1991) UN Doc S/RES/687, paras 16-19 (the Council decided to establish a fund to pay compensation for damages resulting from the unlawful invasion of Kuwait and a commission to administer it).
[164] See eg, UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373; UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540.

to establish white majority rule.[165] In 1977, the Security Council imposed an arms embargo on South Africa, the first mandatory sanctions against a member state, deciding that having regard to the policies and acts of the South African government, the acquisition of arms by South Africa constituted a threat to the maintenance of international peace and security.[166] Compared with these two sanctions regimes prior to 1990, as the Council was reinvigorated during the post-cold war era, so too the Council's sanctioning practice took a leap in quantitative terms. During this period, mandatory sanctions were imposed on the following states: Iraq and occupied Kuwait, the former Yugoslavia,[167] Somalia,[168] Libya,[169] Liberia,[170] Haiti,[171] Rwanda,[172] Sudan,[173] Sierra Leone,[174] and Afghanistan.[175] The defining element of these decisions was that there were addressed towards states. This is logical, considering the United Nations, as an international organisation, has no formal authority over any entity other than its members.[176]

However, the practice of blanket sanctions against states came to be increasingly criticised on the basis of humanitarian considerations of the impact on the civilian population of the target state.[177] As former Secretary-General Boutros Boutros-Ghali observed:

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[165] UNSC Res 232 (1966); UNSC Res 253 (1968); UNSC Res 277 (1970). See, generally, Vera Gowland-Debbas, Collective Responses to Illegal Acts in International Law*: United Nations Action in the Question of Southern Rhodesia* (Martinus Nijhoff 1990).
[166] UNSC Res 418 (1977) UN Doc S/RES/418.
[167] SC Res 713 (1991) and SC Res 757 (1992) (arms embargo and economic sanctions following military involvement in Bosnia and Herzegovina) and SC Res 1160 (31 March 1998) UN Doc S/RES/1160 (arms embargo concerning activities in Kosovo).
[168] UNSC Res 733 (1992) (arms embargo following outbreak of civil conflict).
[169] SC Res 748 (1992); SC Res 883 (1993) (arms and air traffic embargo in context of refusal to extradite perpetrators of the Lockerbie bombing).
[170] SC Res 788 (1992) (arms embargo following ceasefire violations).
[171] SC Res 841 (1993) (arms embargo and petroleum sanctions in response to the failure of the military regime to restore the legitimate government).
[172] SC Res 918 (1994) (arms embargo in context of systemic internal violence).
[173] SC Res 1054 (1996) and 1070 (1996) (restrictions on Sudanese officials abroad following an assassination attempt against the Egyptian President).
[174] SC Res 1132 (8 October 1997) UN doc S/RES/1132 (arms embargo and petroleum sanctions following military coup).
[175] UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267 (travel restrictions and asset freeze against Taliban regime, following failure to extradite Usama bin Laden).
[176] UN Charter (1945), art 2(6) provides that the UN shall *seek the assistance* of non-member states in activities relating to international peace and security. From this, we can surmise that the United Nations cannot presume that any other entity other than member states are bound by its decisions, and those of its organs. See, generally, Jan Klabbers, *International Law* (2nd edn, Cambridge University Press 2017) 195, who supports this argument with reference to the classic *pacta tertiis* principle: treaties create neither rights nor obligations for third parties.
[177] See, generally, Symposium on 'Sanctions and the Operation of Humanitarian Exceptions' (2002) 13 *European Journal of International Law* 43, especially: Matthew Craven, 'Humanitarianism and the Quest for Smarter Sanctions' (2002) 13(1) *European Journal of International Law* 43; Mary Ellen O'Connell, 'Debating the Law of Sanctions' 13(1) *European Journal of International Law* 63; Lutz Oette, 'A Decade of Sanctions against Iraq: Never Again! The End of Unlimited Sanctions in the Recent Practice of the UN Security Council' 13(1) *European*

> Sanctions, as is generally recognized, are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects. Sanctions also always have unintended or unwanted effects.[178]

The view of previous Secretary-General Ban Ki-moon is that Article 41 measures are designed not to punish but to secure compliance with international obligations.[179] However, it would seem that the main consequence of blanket sanctions was exactly that. But those who suffer from these punitive measures are not those government leaders who are responsible for the original breach. In 2000, the United Nations Human Rights Commission's Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution suggesting that the Security Council permit the import of food, medical, and pharmaceutical supplies in Iraq.[180] The same year a working paper prepared for the Sub-Commission criticised the sanctions against Iraq as 'unequivocally illegal' under existing international human rights law and humanitarian law.[181] Also, the monitoring body for the International Covenant on Economic, Social and Cultural Rights, its Committee on Economic, Social and Cultural Rights, has expressed concern in its general comments about the impact of economic sanctions on the enjoyment of human rights.[182]

In the late 1990s, concern about the humanitarian impact upon civilian populations of blanket sanctions against states, particularly those against Iraq, led to a shift in policy by the Security Council. In an important move towards so-called 'smart sanctions,' the Security Council

Journal of International Law 93. See, further, August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 *American Journal of International Law* 85; Mielle Bulterman, 'Fundamental Rights and the UN Financial Sanctions Regime' (2006) 19 *Leiden Journal of International Law* 753.

[178] 'Report of the Secretary-General on the Work of the Organization: Supplement to an Agenda for Peace' (3 January 1995) UN Doc A/50/60-S/1995/1, para 70.

[179] Security Council 'Security Council Sanctions Most Effective as Part of Holistic Conflict Resolution Approach, Secretary-General Says at New York Symposium' (30 April 2007) Press Release SC/9010.

[180] UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 'Human Rights and Humanitarian Consequences of Sanctions Including Embargoes' (2000) UN Doc E/CN.4/Sub.2/RES/2000/1.

[181] UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 'The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights' (2000) UN Doc ECN.4/Sub.2/2000/33, at para 6.

[182] See, UN Committee on Economic, Social and Economic Rights, 'The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Right's, General Comment 8, UN Doc E/C.12-1997/8; UN Committee on Economic, Social and Cultural Rights, 'The Right to the Highest Attainable Standard of Health', General Comment 14, UN Doc E/C.12/2000/4 (2000).

decided to start targeting sanctions measures against specific individuals and entities within states, as opposed to the state as a whole. Sanctions were first imposed against a non-state entity in the form of UNITA forces in Angola.[183] Today, there are currently fourteen ongoing sanctions regimes, which focus on supporting the political settlement of conflicts, nuclear non-proliferation, and counter-terrorism.[184]

Legally, these regimes are not addressed to individuals but to states, who are tasked with implementing the sanctions. However, considering that these regimes have as their aim the restriction of freedom of movement of individuals, it is obviously necessary to identify individuals and entities by name.[185] Particularly in view of important decisions by the European Court of Justice, the European Court of Human Rights, the United Kingdom Supreme Court, and other courts in cases such as *Kadi, Nada,* and *Ahmed,* Security Council sanctions targeting individuals and legal entities associated with terrorism have been criticised for their potentially far-reaching encroachments on the rights and freedoms of those targeted, with rather limited possibilities for the targets to seek redress.[186] The consequence of being listed for an individual has been described as a form of 'civic death', as it includes measures as serious as the comprehensive freezing of an individual's assets around the globe, and the denial of international travel, visas, and educational opportunities for the blacklisted individual and their families.[187] Somewhat paradoxically, a shift in policy engineered to inject greater fairness into the sanctions regime has subsequently given rise to nearly two decades of debate about the lack of due process in sanctions decision-making.

Accountability questions arise in relation to both the procedures for listing and delisting individuals.[188] In relation to the former, although ultimate responsibility for the creation of the sanctions list lies with the 1267 Committee, which comprises all fifteen members of the

[183] UNSC Res 864 (15 September 1993) (arms embargo and petroleum sanctions, following UNITA'S failure to observe ceasefire).
[184] Larissa van den Herik, 'The Individualization and Formalization of UN Sanctions' in Larissa van den Herik (ed) *Research Handbook on UN Sanctions* (Edward Elgar Publishing 2017) 1, 1.
[185] Klabbers, *International Law* (n 176) 196.
[186] Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECLI:EU:C:2008:461; *Nada v Switzerland* (Grand Chamber, Judgment) (12 September 2012); *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.
[187] Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford University Press 2016) 13.
[188] The Al Qaida sanctions regime was established by UNSC Res 1267 (1999) and subsequently modified and strengthened by resolutions 1333 (2000), 1390 (2002), 1526 (2004), 1617 (2006), 1735 (2006), 1822 (2008), 1904 (2009), 1989 (2011), 2083 (2012) and 2161 (2014).

Council, names are submitted by individual member states. Decisions are generally made on a 'no-objection procedure'; that is, a proposed name will be added to the list if no Committee Member objects to the listing within ten working days. In practice, 'there is little or no independent evaluation of the evidence by the Committee',[189] which gives 'an almost unlimited latitude of discretionary powers to member states'.[190] Permanent members have always been 'careful to maintain the *ad hoc* nature of the architecture so as to keep maximum control'.[191] The result of the overall approach has been to give 'an almost unlimited latitude of discretionary powers to member states'.[192] However, this discretion is afforded only to the states submitting the name to the Committee. States of residence and nationality (or incorporation or location for entities) have frequently complained that the Committee has added or removed a name without consulting them. This has 'led to accusations of double standards or even to the sense that the sanctions regime reflects the concerns of Committee members more than those of other Member States, including those that face the greatest threat from Al-Qaida and the Taliban'.[193]

The de-listing procedure has proved to be the most contentious issue affecting the sanctions regime, marked by a great deal of reluctance to implement reform on the part of the permanent five. Individuals and entities historically had no direct access to the Sanctions Committee to challenge their listings. It was initially the case that listed individuals and entities were dependent on the agreement of their state of nationality or residence to take up their case on their behalf. Those individuals unfortunate to come from countries who were either unwilling or unable to take up their case, or with whom Council members were unwilling to negotiate, had no access to the Sanctions Committee.[194] According to an influential report by Bardo Fassbender, the root of the accountability deficiency lies in the fact that the general 'right of person or entity to an effective remedy against an individual measure before an impartial institution or body previously established' is not provided for.[195] Both the United Nations High

[189] Hovell (n 187) 14.
[190] Ibid 16.
[191] Van den Herik (n 184) 4.
[192] Hovell (n 187) 16.
[193] 'Report of the Analytical Support and Sanctions Monitoring Team on the outcome of the review described in paragraph 25 of resolution 1822 (2008) submitted pursuant to paragraph 30 of resolution 1904 (2009)' (29 September 2010) UN Doc S/2010/497, para 24.
[194] Hovell (n 187) 20.
[195] Bardo Fassbender, 'Targeted Sanctions and Due Process' (20 March 2006) Study commissioned by the United Nations Office of Legal Affairs <http://www.un.org/law/counsel/Fassbender_study.pdf> at 28

Commissioner for Human Rights[196] and the United Nations Special Rapporteur on human rights and counter-terrorism[197] have determined that the 1267 sanctions regime falls short of internationally recognised standards of due process. In the 2005 World Summit declaration, the General Assembly called on the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures are in place for the imposition and lifting of sanctions measures.[198] The focus of the contemporary debate is on the difficulty of the individual to challenge his or her listing. As the Watson Institute reported in 2009, the 'rights to a fair trial and effective remedy lie at the heart of the debate on targeted sanctions violating individuals' human rights'.[199]

For a long time, it was assumed that efficiency should rule over accountability. The statement of the then Chairman of the Sanctions Committee, Ambassador Alfonso Valdivieso of Colombia, that '[w]e are dealing with terrorism … It may be controversial, but all who have suggested alternatives are aware that we must not waste time on definitions, because the terrorists are acting', is illustrative of the general sentiment of the time.[200] However, the sheer weight of the criticisms levelled against the Council associated with due process deficiencies did force through a change in Security Council practice. First, in December 2006, the Security Council established a 'focal point' initiative – a non-state-based forum to which designated individuals or entities could submit a request for de-listing. However, upon receiving a de-listing request from an individual, the focal point sent it to the designating state, the state of residence, and the state of nationality. It was only if one of those states supported the request that it was placed on the Committee's agenda.[65] Where a de-listing request was placed on the Committee's agenda, the focal point was entitled to attend deliberations, though did not formally represent the individual's interests in the course of the decision-making. As Hovell suggests the 'impact of the focal point on the due process rights of individuals was minimal'.[201]

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[196] 'Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (15 December 2010) UN Doc A/HRC/16/50, para 21: 'While the newly-established de-listing procedures represent an important step towards fair and clear procedures, the gulf between the 1267 regime and due process-related requirements in international human rights law and the need for more comprehensive reform remain'.

[197] 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (2 August 2010) UN Doc A/65/258, paras 56–7.

[198] UNGA Res 60/1, 'World Summit Outcome Document' (24 October 2005) UN A/RES/60/1, paras 106-109.

[199] Thomas Biersteker and Sue Eckert, *Addressing Challenges to Targeted Sanctions: An Update of the 'Watson Report'* (Watson Institute for International Studies 2009), 10

[200] Serge Schemann, 'A Nation Challenged: Sanctions and Fallout' (26 January 2002) *New York Times* <https://www.nytimes.com/2002/01/26/world/nation-challenged-sanctions-fallout-swedes-take-up-cause-3-us-terror-list.html> (cited in Hovell (n 187) 16).

[201] Hovell (n 187) 21.

Growing perceptions about the inadequacy of the focal point as a procedural safeguard for individuals led, the Security Council to adopt resolution 1904 (2009), establishing the Office of the Ombudsperson as a direct result of the 'challenges, both legal and otherwise, to the measures implemented by Member States'.[202] The Ombudsperson is not an adjudicatory process, but does fulfil an inquisitorial role. Upon receiving a de-listing request, the Ombudsperson engages a comprehensive investigation, during which s/he seeks all relevant information available from the Committee, the designating state, and the state of nationality, and may include a dialogue with the petitioner, to gain any additional information that may help the Committee with its decision. In addition, the request is forwarded to the Monitoring Team, which is required to assemble a portfolio of relevant information drawn from court decisions, news reports, and fact-based assessments of the information provided by the petitioner. If the Ombudsperson recommends de-listing, the individual or entity will be removed from the list unless, within sixty days, the Committee decides by consensus to maintain the listing. The Committee is now required to provide reasons for rejecting the request and provide an updated narrative summary of reasons for listing for the Ombudsperson.[203] This independent and impartial organ has been established to investigate delisting requests from individuals and make 'recommendations' to the competent Sanctions Committee of the Security Council. The targeted sanctions imposed by the 1267/1989 sanctions regime, both as they operated in the past and as they operate today that is, despite the enhanced Ombudsperson procedure, may be seen as being in violation of the right of access to a court and the right to an effective remedy of the targeted individuals and legal entities. Despite enhancement of the delisting procedure in Resolution 1989 for the Al-Qaida regime, which in effect imposed a reverse consensus requirement for the 'recommendation' of the Ombudsperson not to be accepted by the Sanctions Committee, recourse remains limited, since in the final analysis delisting remains within the discretion of the Security Council.[204]

4.1.2. Forcible Measures

[202] UNSC 1904 (17 December 2009) UN Doc S/RES/1904, preamble.
[203] See, UNSC Res 2083 (2012) UN Doc S/RES/2083 and UNSC 2161 (2014) UN Doc S/RES/2161.
[204] Antonios Tzanakopoulos, 'Sharing Responsibility for UN Targeted Sanctions' (2015) 12 *International Organizations Law Review* 427, 431-432.

The power to authorise the use of force was, of course, originally delegated to the Security Council and, in the absence of a justification under the law of self-defence, the Security Council only. The controversies surrounding the delegation method have been explicitly framed as questions of accountability. According to Sarooshi, upon 'a subsequent delegation of these powers the lines of accountability may become unclear'.[205] It is important, therefore, that 'the authority to which power has initially been delegated remains accountable for the way in which the power is being exercised'.[206] In the early stages of the development of the delegation method, certain states, particularly developing states, also questioned the practice through the lens of accountability. In the words of the representative of Yemen stated in the Council preceding the adoption of resolution 678, authorising the use of force against Iraq:

> … the draft resolution before us is not related to a specific article of Chapter VII of the Charter; hence the Security Council will have no control over those forces, which will fly their own national flags. Furthermore, the command of those forces will have nothing to do with the United Nations, although their actions will have been authorized by the Security Council. It is a classic example of *authority without accountability*.[207]

Moreover, the 'non-aligned members' prepared a draft which would have in express terms mandated the 'active involvement of the Secretary-General' and required 'accountability to the Security Council'.[208] These criticisms notwithstanding, since 1990 the Security Council has authorised the use of force on multiple occasions. It has done so in Iraq,[209] Somalia,[210] Bosnia-Herzegovina,[211] Rwanda,[212] Haiti,[213] Zaïre,[214] Albania,[215] the Central African Republic,[216]

[205] Sarooshi (n 155) 16.
[206] Ibid 25.
[207] UNSC Provisional Verbatim Record (29 November 1990) UN Doc S/PV.2963, at 33 (emphasis added).
[208] Sarooshi, (n 155) 201; see, further, Freudenschuβ (n 147) 496.
[209] UNSC Res 678 (22 November 1990) UN Doc S/RES/678.
[210] UNSC Res 794 (3 December 1992) UN Doc S/RES/794; UNSC Res 1744 (21 February 2007) UN Doc S/RES/1744; UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816.
[211] UNSC Res 816 (131 March 1993) S/RES/816.
[212] UNSC Res 929 (22 June 1994) UN Doc S/RES/929. It is important to note, however, that the authorisation for France and Senegal to intervene came about only *after* the genocide had already occurred. See, section 3.3, for how Security Council inaction can also contribute to a separate dimension of its accountability deficit.
[213] UNSC Res 940 (31 July 1994) UN Doc S/RES/940; UNSC Res 1529 (29 February 2004) UN Doc S/RES/1529.
[214] UNSC Res 1080 (15 November 1996).
[215] UNSC Res 1101 (28 March 1997).
[216] UNSC Res 1125 (6 August 1997) UN Doc S/RES/1125; UNSC Res 2121 (10 October 2013); UNSC Res 2127 (5 December 2013) UN Doc S/RES/2127; UNSC Res 2134 (28 January 2014) UN Doc S/RES/2134; UNSC Res 2149 (10 April 2014); UNSC Res 2162 (26 June 2014) UN Doc S/RES/2162; UNSC Res 2217 (28 April 2015) UN Doc S/RES/2217.

Guinea-Bissau,[217] Timor-Leste,[218] Afghanistan,[219] Côte d'Ivoire,[220] the Democratic Republic of Congo,[221] Chad,[222] Libya[223] and Mali.[224]

The first area of controversy relates to the practice of Security Council intervention in matters which are essentially within the domestic jurisdiction of states. While the Security Council has primary responsibility for *international* peace security, during the 1990s a clear practice emerged in relation to the authorisation of the use of force in non-international, or internal, situations. It bears stressing that, for a great deal of the Council's history, this would have been regarded as a controversial proposition. In its first year, the Council had, after all, rejected the suggestion that the Franco regime in Spain constituted a threat to the peace, noting that 'a very sharp instrument' had been entrusted to the Council, and that care should be taken that 'this instrument is not blunted or used in any way which would strain the intentions of the Charter or which would not be applicable in all similar cases'.[225]

The high-water mark is surely the Council's authorisation to member states to use force to restore a democratically elected government. Acting under Chapter VII, it authorised member states to create a multinational force to 'use all necessary means … to facilitate the departure from Haiti of the military leadership … the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the government of Haiti'.[226] Article 2(7) states that '[n]othing contained within the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'. However, and more importantly for our purposes, this provision is explicitly qualified in that it 'shall not prejudice the application of enforcement measures under Chapter VII'. By 1995 the International Criminal Tribunal for the Former Yugoslavia was able to assert that:

[217] UNSC Res 1216 (21 December 1998) UN Doc S/RES/1216.
[218] UNSC Res 1264 (15 September 1999) UN Doc S/RES/1264.
[219] UNSC Res 1368 (20 December 2011) UN Doc S/RES/1368.
[220] UNSC Res 1464 (4 February 2003) UN Doc S/RES/1464.
[221] UNSC Res 1484 (30 May 2003) UN Doc S/RES/1484; UNSC Res 1528 (27 February 2004) UN Doc S/RES/1528.
[222] UNSC Res 1778 (25 September 2007) UN Doc S/RES/1778.
[223] UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.
[224] UNSC Res 2085 (20 December 2012) UN Doc S/RES/2085); UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100; UNSC Res 2164 (25 June 2014) UN Doc S/RES/2164.
[225] 'The Report of the Sub-Committee on the Spanish Question Appointed by the Security Council' (1 June 1946) UN Doc S/75, at 12 (cited in Chesterman (n 130) 130).
[226] UNSC Res 940 (31 July 1994) UN Doc S/RES/940, para 4.

> the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a 'threat to the peace' and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly … It can thus be said that there is a common understanding, manifested by the 'subsequent practice' of the membership of the United Nations at large, that the 'threat to the peace' of Article 39 may include, as one of its species, internal armed conflicts.[227]

The second issue relates to the fact that although states have reporting obligations to the Security Council, 'this does not normally lead to any exertion of continuing control over the operation' by the Security Council'.[228] Once the Council authorises the use of force, it can, in theory, amend or revoke the authorisation at any time.[229] However, in practice any such modification must overcome the hurdle of the 'reverse veto'. As a result, there is a risk of the Security Council 'entering into a kind of 'black hole' whenever it adopts a Chapter VII resolution'.[230] Considering the unlikelihood of permanent members accepting any formal restrictions on the use of the veto, a more practical option might be to include 'sunset clauses' in use-of-force resolutions, fixing the date that an authorisation will expire.[231] The Council has followed this practice in almost all authorisations to use force since Rwanda in 1994.[232] This practice has also been implemented to a certain degree in relation to the non-forcible measures.[233] Security Council resolution 1989, for example, determines that once the Ombudsperson recommended de-listing or a State requested de-listing, such de-listing should occur unless all members of the Al Qaida sanctions committee disagreed with the recommendation or request within a sixty-day period.[234] In relation to forcible measures though, this practice has not been as consistent. Most consequentially, Resolution 678 (1991), which authorised the use of force following the Iraqi invasion of Kuwait, however, did not contain an expiration date.[235] This led to major debates in 2003 when the United States and the

[227] *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995), at para 30.
[228] Tsagourias and White (n 5) 253.
[229] Karine Bannelier and Théodore Christakis, 'Between Flexibility and Accountability: How can the Security Council Strengthen Oversight of Use-of-Force Mandates?' in Jeremy Farrall and Hilary Charlesworth, *Strengthening the Rule of Law through the UN Security Council* (Routledge 2016) 209, 211-212.
[230] Ibid.
[231] Ibid 212.
[232] UNSC Res 929 (22 June 1994) UN Doc S/RES/929, at paras 3-4: 'authorizes the Member States … to conduct the operation … using all necessary means to achieve the humanitarian objectives', but further '[d]ecides that the mission of Member States … will be limited to a period of two months following the adoption of the present resolution'.
[233] See, generally, Dire Tladi and Gillian Taylor, 'On the Al Qaida/Taliban Sanctions Regime: Due Process and Sunsetting' (2011) 10 *Chinese Journal of International Law* 771.
[234] UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989, at paras 23 and 27.
[235] UNSC Res 678 (22 November 1990) UN Doc S/RES/678.

United Kingdom argued that the original authorisation still remained valid thirteen years later.[236]

In sum, the post-Cold War period of Security Council saw a newly rejuvenated Security Council extend the scope of its Chapter VII powers in ways that had previously been unforeseen. Three issues stand out in particular. The first is that the move from blanket to targeted sanctions has done little to quell anxieties relating to human rights deficiencies; on the contrary, they have been heightened. The second is that the Council used the 'elasticity' of Article 39 to extend the scope of its operations beyond matters explicitly relating to *international* peace, but into internal conflicts. The third relates to the authorisation method itself, and the lack of overall control that the Council maintains over delegated enforcement measures.

4.2. Ambiguity

Ambiguity has been a recurring feature of resolutions which authorise (or, of course, as the case may, do not authorise) the use of force since the Council first involved itself in this field in 1950. As we will recall, Resolution 83 (1950) 'called upon' member states to provide assistance to the Republic of Korea in order to repel North Korea's attack.[237] Three critical points can be levelled at this operative paragraph. First, it is unclear as to whether the resolution satisfied the Council's formal voting requirements, considering the absence of the Soviet Union, in protest against the non-recognition of the People's Republic of China as the legitimate representative of the regime. Second, the hortatory language of 'calls upon' gives rise to the question as to whether this constitutes a binding Chapter VII resolution, which would be necessary for the use of force mandate to constitute a lawful delegation of power. Third, there is ambiguity surrounding the phrase 'restoration of peace and security in the area'. This would appear to be an extremely open-ended mandate. It has been argued, for example, that the mandate extended to pursuing North Korea across the 38th Parallel (territorial demarcation between North and South Korea), in order to eliminate their ability to launch future attacks.[238]

[236] A further elaboration on the legality of the Iraq War is, of course, outside the scope of this thesis. See, generally, Sean D Murphy, 'Assessing the Legality of Invading Iraq', (2004) 92 *Georgetown Law Journal* 173; and Michael J Glennon, 'Why the Security Council Failed?' (2003) 82 *Foreign Affairs* 16.
[237] UNSC Res 83 (n 139).
[238] See, eg, Ian Johnstone, 'When the Security Council is Divided: Imprecise Authorizations, Implied Mandates, and the Unreasonable Veto' in M Weller (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 227, 234; Jules Lobel and Michael Ratner, 'Bypassing the Security Council: Ambiguous

Of course, the issue of ambiguity is not linked to the *legality* of the Security Council resolution. Michael Byers is correct that 'nothing in the Charter to suggest[s] that the Security Council lacks the capacity to adopt a resolution that is deliberately open to different interpretations'.[239] This second accountability deficit should, therefore, be distinguished from the first, is it is not a legal question *per se.* To be sure, 'in the rough and tumble of Council politics, it is too much to expect perfect consistency' in terms of the specific language used in resolutions.[240] Furthermore, considering the necessity to ensure permanent member support for Chapter VII enforcement action, ambiguity might be necessary in order to arrive at a compromise resolution between rival positions. In another context, this type of 'constructive ambiguity' has been described as 'fudging'.[241] That is, language is deliberately framed in a way that a number of different interpretations. As Dapo Akande and Marko Milanovic explain, constructive ambiguity can be used as a tool which ensures that permanent members 'politically move closer together without departing from the legal positions that they had previously adopted, and without compromising their essential interests.'[242] Seen in the best light, therefore, ambiguity might be viewed as a 'safety valve that helps to buy time, in the hope that the problems giving rise to its deployment can be addressed later, in circumstances more favourable'.[243]

Ambiguity in Security Council resolutions has not received a great deal of academic attention.[244] Michael Byers suggests that 'recognizing the existence of such ambiguities could undermine the ideal of a determinative, apolitical body of rules'.[245] However, this is not a good

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[239] Michael Byers, 'Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity' (2004) 10 *Global Governance* 165, 180; Johnstone (n 238) 242.

[240] Johnstone (n 238) 229.

[241] David Mitchell, 'Cooking the Fudge: Constructive Ambiguity and the Implementation of the Northern Ireland Agreement, 1998–2007 (2009) 24(3) *Irish Political Studies* 321, 322, who defines 'constructive ambiguity' as 'the deliberate use of ambiguous language on a sensitive issue in order to advance some political purpose'. See, in the context of the Security Council, Johnstone (n 238) 228: 'ambiguity is often intentional, as a way of papering over or managing political differences'.

[242] Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution' (21 November 2015) *EJIL: Talk* <https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>

[243] Byers (n 239) 181. Although recent examples are particularly telling, ambiguity has long been a feature of Security Council practice, see, eg, Richard Bilder, 'The Office of the Legal Advisor: The State Department Lawyer and Foreign Affairs' (1962) 56(3) *American Journal of International Law* 633, 654: 'Often agreement on a particular matter will only be possible through the adoption of very broad language in the text, which in effect leaves the problem for later resolution'.

[244] Byers (n 239) 166.

[245] Ibid.

reason to avoid an issue that has the potential to yield significant implications for the functioning of the collective security regime.

Consider the following four examples. In relation to the Iraqi invasion of Kuwait in 1990, Resolution 678 authorised member states cooperating with Kuwait to 'use all necessary means to uphold and implement … all subsequent resolutions and to restore international peace and security in the area'.[246] Again, the implications of 'all subsequent resolutions and to restore international peace and security in the area' is unclear. For example, it prompted significant debates as to whether the United Nations-led coalition was permitted to use force in response to alleged Iraqi war crimes, or if the mandate extended to regime change in Baghdad.

More recently, the wording of the authorisation to use force in Libya in Resolution 1973 has led to conflicting interpretations. Russia, in particular, has been extremely critical in how the NATO coalition interpreted its mandate to 'use all necessary means' to protect the civilian population in Libya. Most consequentially, there was significant ambiguity around whether the authorisation to protect civilians, and impose a no-fly zone,[247] permit regime change[248] if necessary to fulfil their enforcement. Some of the criticism of the implementation of Resolution 1973 was particularly scathing. China, for example, spoke strongly against 'any arbitrary interpretation of the Council's resolutions or of any actions going beyond those mandated by the Council'.[249] And Russia suggested that 'any use of force by the coalition in Libya should be carried out in strict compliance with resolution 1973 (2011). Any act going beyond the mandate established by that resolution in any way or any disproportionate use of force is unacceptable'.[250]

The mandate was 'to take all necessary measures … to protect civilians in populated areas under threat of attack'.[251] However, throughout the course of the operation, undertaken predominantly by the United States, France and the United Kingdom, the objective shifted markedly and was ultimately extended to include the destruction of the military and economic infrastructure of the regime, military support for the rebels forcibly overthrowing the regime

[246] UNSC Res 678 (29 November 1990) UN Doc S/RES/678, at para 2.
[247] Ibid, at para 4.
[248] Ibid, at para 8.
[249] UNSC Provisional Verbatim Record (4 May 2011) UN Doc S/PV.6528, at 10.
[250] Ibid at 9.
[251] UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973, at para 4.

in power.[252] The latter is by far the most controversial issue. It seems difficult to interpret Resolution 1973 as containing an authorisation to overthrow the Gaddafi regime. In fact, references to the Council's 'strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamihiriya' seem to point in the opposite direction. Many states have expressed their doubts as to the legality of the intervention, considering the expansive interpretation of the mandate received pursuant to Resolution 1973.[253]

On the one hand, it might be argued that it was in fact necessary to overthrow the Gaddafi regime, and that this should be viewed as the logical extension of the mandate, as opposed to a radical reinterpretation. Mehrdad Payanded, for example, argues that while regime change was not authorised as a legitimate aim in itself, it could be conceived as one potentially necessary means through which to realise the explicit aim of the Resolution: the protection of civilians.[254] To Christine Gray, the mandate could be 'interpreted as flexible enough to cover NATO's use of force so long as pro-Gaddafi forces continued to flight and even to overthrow Gaddafi if this was necessary'.[255] This was clearly the position that the NATO participating states had taken.[256] However, 'the international community of States cannot be seen as having accepted or recognized the extended objectives of the States intervening in Libya'.[257] The Libyan precedent has assuredly had broader implications, for 'if States fear that what seems at first hand a specific mandate will end up a blank cheque, they will justifiably be reluctant to write any cheque the next time around, as the Syrian precedent illustrates'.[258]

Additionally, the wording of Resolution 2085 (2012), which '*urges* Member States, regional organizations and international organizations to provide … any necessary assistance in efforts to reduce the threat posed by terrorist organizations' is particularly ambiguous.[259] The question

[252] Olivier Corten and Vaios Koutroulis, 'The Illegality of Military Support to Rebels in the Libyan War: Aspects of *jus contra bellum and jus in bello* (2013) 18(1) *Journal of Conflict and Security Law* 59, 69-74.
[253] See, generally, UNSC Provisional Verbatim Record (17 March 2011) UN Doc S/PV.6498.
[254] Mehrdad Payandeb, 'The United Nations, Military Intervention, and Regime Change in Libya' (2012) 52(2) *Virginia Journal of International Law* 355, 374-75.
387-391
[255] Christine Gray, 'The Use of Force for Humanitarian Purposes' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Council* (Edward Elgar 2013) 229, 250.
[256] Barack Obama, David Cameron and Nicholas Sarkozy, 'Libya's Pathway to Peace' (14 April 2011) *New York* Times https://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html: 'so long as Qaddafi is in power, NATO must maintain its operations so that civilians remain protected and the pressure on the regime builds'.
[257] Corten and Koutoulis (n 252) 77.
[258] Ibid 92.
[259] UNSC Res 2085 (20 December 2012) UN Doc S/RES/2085, at para 14.

as to whether this ambiguous language authorised military action by France, was put to the test in January 2013 when Al Qaida in the Islamic Maghreb and its allies seized the town of Konna before Council authorised peacekeeping forces had deployed. French forces intervened unilaterally. To Johnstone, 'the implication seems to be that the French interpretation of Resolution 2085 (2012), as implicitly authorizing the use of force, was accepted'.[260] The legal basis of this interpretation, however, is not clear.

The final example relates to Resolution 2249 (2015). In the aftermath of the Paris terrorist attacks, members of the Security Council were quick to determine that the perpetrators of the attack 'constitute an unprecedented threat to international peace and security'.[261] An armed attack against a permanent member of the Council might easily have triggered the authorisation of forceful measures. However, member states of the Council, while seemingly in agreement that *a* response was necessary, were manifestly unable to reach consensus on the substance of what that response should be. As a result, the resolution is inherently ambiguous in that the operative paragraph '[C]alls upon Member States … to take all necessary measures … on the territory under the control of ISIL … in Syria and Iraq'.[262]

It is almost definitely the case that the Security Council did not intend to authorise the use of force in this instance, for resolutions of this kind traditionally 'decide' or indeed expressly 'authorise' such measures, but the resolution could be interpreted in a number of ways. The use of the phrase 'all necessary measures' in an operative paragraph of a Council resolution that does not include an affirmative decision is also somewhat rare. We have seen above that, notwithstanding the cold war precedents of Korea and Southern Rhodesia, the Security Council has developed a clear practice of either 'deciding' that states may or in fact 'authorising' states to use force. Considering that the Council has been paralysed in respect to action in Syria since the outbreak of the Syrian Civil War in 2011, we would expect clear and unambiguous language in the event that this stalemate was broken. This was not the case. Resolution 2249, therefore, is essentially 'designed to provide legitimacy for the measures being taken, and to be taken, against IS by giving the Council's imprimatur to such measures'.[263] This is inherently

[260] Johnstone (n 238) 243.
[261] UNSC Res 2249 (2015) UN Doc S/RES/2249, preamble.
[262] Ibid, at para 5.
[263] Akande and Milanovic (n 242). A fuller exploration of the legality of forcible measures against ISIL in Syria is beyond the scope of this thesis. See, instead, Théodore Christakis (ed), 'Symposium on the Fight against ISIL and International Law' (2016) 29(3) *Leiden Journal of International Law* 737, and articles therein.

problematic, considering the actual legal basis remains dubious, in the absence of express Council authorisation. The Syrian regime has not consented to the use of force on its territory, and the law of self-defence against not state actors remains extremely contestable.

To Johnstone, constructive ambiguity 'may be less than ideal, but it is better than demanding an unrealistic level of lawmaking precision from the Security Council, thereby rendering it irrelevant'.[264] As the following examples show, however, ambiguity in Security Council resolutions have permitted member states to expansively interpret certain Council resolutions, which has resulted in unilateral action which either completely contradicted the will of the Security Council, or at least exceeded it. This has resulted in a dual paradox. First, the Security Council has provided its imprimatur, albeit indirectly and ambiguously, to member states to take unilateral action which in defiance of the principle of collective security, upon which the United Nations is built. This kind of 'carte blanche' to states is dangerous for the collective security system – indeed, it runs contrary to the idea of collective security altogether.[265] It is, in some ways, as if the Security Council 'is acting as a bailiff, who opens the door and [then] disappears'.[266] Second, in doing so, and pace Johnstone, the Council has made itself largely *irrelevant* in these cases.

4.3. Failing to Act

The problem of ambiguity feeds directly into the final dimension of the Security Council's accountability deficit: the problem of inaction. As Johnstone observes, '[e]xpansive interpretations of Security Council (in)action may deter member from ever agreeing to strongly worded resolutions or even discussing contentious issues'.[267] By means of example, in vetoing a condemnatory resolution against Syria in 2011, Russia stated in reference to the Libya precedent: 'It is very important to know how [Resolution 1973] was implemented and how a Security Council resolution was turned into the opposite'.[268]

Article 4 of the Articles on Responsibility of International Organizations specifies that there is an internationally wrongful act when 'conduct consisting of an action *or omission'* is

[264] Johnstone (n 238) 243.
[265] Bannelier and Christakis (n 229) 211.
[266] Ibid.
[267] Johnstone (n 238) 249.
[268] UN Doc S.PV.6627 (4 October 2011) at 4.

attributable to an international organization and breaches an obligation incumbent on the organization.[269] However, there has been extremely limited attention afforded to the notion of omissions in international legal literature,[270] and discussions in the International Law Commission when preparing both the drafts articles on state responsibility and its counterpart relating to international organisations, are light on detail.[271]

The League of Nations Covenant was adopted against the background of President Wilson's proposal that violation of Covenant engagements would place the wrongdoer state under an automatic boycott, entailing its isolation from the rest of the world.[272] Collective security under the Charter involves little automation of this kind though and decisions are largely discretionary. Immediate, automatic action is not provided for, still less any obligation on individual members to assist the state which has been attacked.[273] Therefore, and notwithstanding the increased use of Chapter VII measures during the 1990s, the possibility of inconsistency, and inaction in the face of humanitarian crises is actually built into the Charter. The collective security system 'is triggered not by the seriousness of the threat per se, but by a confluence of political, economic, humanitarian and military factors, which align sufficiently for a [Security Council] resolution to be secured'.[274] Surprisingly, to date, the question of Security Council inaction has not been framed as an accountability issue. It is not clear why this is the case. As Anne Peters suggests:

> This issue is salient, because the real problem is not that the United Nations would intervene too often, but that the Security Council has abstained from authorising military activities even in situations where the qualitative threshold for triggering what later became called [the responsibility to protect] had been reached.[275]

The Security Council's failure to prevent the genocide in Rwanda in 1994 immediately comes to mind. Rwanda had been embroiled in a civil war since October 1990, fought between Hutu government forces and the Tutsi-led Rwandan Patriotic Front which launched an invasion from

[269] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries', in Report on the Work of Its Fifty-third Session (23 April 1 June and 2 July - 10 August 2001) UN Doc A/56/10
[270] See, for a rare, and recent, example, Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act' (2017) 28(4) *European Journal of International Law* 1133.
[271] Ibid.
[272] Orakhelashvili, *Collective Security* (n 9) 8.
[273] Ibid.
[274] Tsagourias and White (n 5) 255.
[275] Anne Peters, 'The Security Council's Responsibility to Protect' (2011) 8(1) *International Organisations Law Review* 15, 17.

Uganda.[276] In August 1993 a truce was negotiated in Arusha, Tanzania, calling for an interim administration and new elections. In October 1993 the Security Council established the peace-keeping operation 'United Nations Assistance Mission for Rwanda' with the mandate of 'contributing to the establishment and maintenance of a climate conducive to the secure installation and subsequent operation of the transitional government'.[277] However, the parties were not all committed to the implementation of the agreement. The crisis was ignited when the plane carrying the then Rwandan Juvénal Habyarimana and his Burundian counterpart, Cyprien Ntaryamira was shot down.[278] Fighting broke out and the next day militant Hutus also killed Rwandan Prime Minister Agathe Uwilingiyimana, and seized control of the government, claiming that Habyarimana had been assassinated by Tutsi rebels. This provoked rampages against Tutsis and moderate Hutus by security forces and armed gangs loyal to the government.

It is widely accepted that 'the perception of near indifference on the part of the international community has left a poisonous legacy that continues to undermine confidence in the Organization'.[279] The Independent Inquiry into the Genocide specifically identifies the failures of the Security Council. According to its report, 'The Security Council bears a responsibility for its lack of political will to do more to stop the killing … The delay in decision-making by the Security Council was a distressing show of lack of unity in a situation where rapid action was necessary'.[280] According to its report: 'The Security Council bears the responsibility for the hesitance to support new peacekeeping operations'.[281]

This was followed by the failure of UNPROFOR to protect UN-designated Muslim safe areas in Bosnia from genocidal attacks by the Bosnian Serb army, culminating in the massacre of approximately 8,000 unarmed men and boys in Srebrenica in July 1995. The Secretary-General suggested that 'the international community as a whole must accept its share of responsibility for allowing the tragic course of events by its prolonged refusal to use force in the early stages of the war. This responsibility is shared by the Security Council … which contributed to the

[276] Chesterman (n 130) 144-147.
[277] Report of the UN Secretary-General on Rwanda (24 September 1993) UN Doc S/26488.
[278] Ibid.
[279] Report of the UN Secretary-General, 'The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa' (13 April 1998) UN Doc S/1998/318, at para 11.
[280] The Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda (15 December 1999) UN Doc S/1999/1257, at 37-38.
[281] The Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda (15 December 1999) UN Doc S/1999/1257, at 32.

delay'.[282] The United Nations has been widely criticised for not intervening in Rwanda, in the mid-1990s, and for not stopping the Serbian slaughter in Srebrenica, regardless of whether there is an identifiable legal obligation resting on the United Nations to intervene in such cases. It might be arguable, at least in these two cases there may have been: if both slaughters are seen as genocide, and the prohibition and prevention of genocide is seen as a *jus cogens* norm, then it could be claimed that the United Nations violated an obligation under international law by not intervening.[283]

Whether or not this is framed as a legal responsibility on the Council, it prompted a newfound emphasis on the part of member states to clarify the Security Council's political responsibilities to prevent widespread humanitarian suffering. Of particular relevance in relation to the failures of the Council in Rwanda and Srebrenica is the emerging concept of the 'Responsibility to Protect'. The High-level Panel Report on Threats, Challenges and Change described an

> 'emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other largescale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent'.[284]

With the failures in Rwanda and Srebrenica undoubtedly in mind, the Council has also provided peacekeeping forces with more robust mandates to protect civilians. In 2013, for example, the Council authorised the United Nations Mission in the Republic of South Sudan to protect civilians by not only deterring violence against civilians but also by protecting civilians under imminent threat.[285] Nevertheless, between 8 and 11 July, 2016 hundreds of civilians were killed and raped in Juba, the capital of South Sudan. Allegations were made that the peacekeeping operation failed to respond effectively to protect civilians from the intense fighting that contributed to the collapse of the fragile ceasefire that existed at that time.[286] An

[282] 'Report of the Secretary-General Pursuant to General Assembly Resolution 53/55: The Fall of Srebrenica' (1 November 1999) UN Doc A/54/549, at para 501.
[283] See, chapter 5, section 2.2.1.
[284] Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2 December 2004) UN Doc A/59/565, at para 204.
[285] UNSC Res 1996 (8 July 2011), UN Doc S/RES/1996, at para 3(b).
[286] See, Hanna Bourgeois, 'Failure to Protect Civilians in the Context of UN Peace Operations: A Question of Accountability?' (5 September 2018) *EJIL Talk* <https://www.ejiltalk.org/failure-to-protect-civilians-in-the-context-of-un-peace-operations-a-question-of-accountability/>. Bourgeois also identifies the failure to intervene to protect civilians in Darfur, Sudan (2004) and in North Kivu, the Democratic Republic of the Congo (2008) as relevant examples.

Independent Special Investigation established by the Secretary-General found that 'Inaction by peacekeepers when civilians are attacked within one kilometre of a peacekeeping base should be promptly investigated and peacekeepers, commanders and relevant troop-contributing countries should be held *accountable* for failures to protect'.[287] Of particular relevance, on 31 July 2018, thirty-two States asked the Secretary-General António Guterres to go a step further in addressing the failures of the United Nations-mandated peace operations to protect civilians. In particular, they asked to hold 'those responsible who have failed to protect civilians' in line with their mission's mandate.[288]

Many member states have voiced their discontent at the Council's lack of action in relation to the ongoing situation in Syria and have argued that the Council is not living up to its primary responsibility for the maintenance of international peace and security.[289] In February 2012, High Commissioner for Human Rights Navi Pillay warned that the Security Council's inability to act in Syria 'appears to have fuelled the Syrian Government's readiness to massacre its own people in an effort to crush dissent'.[290]

It is, of course, necessary to qualify calls for a more pro-interventionist Security Council to invoke forcible measures in Syria. There is a good reason to be sceptical, considering the continued humanitarian crisis in Libya, post-NATO's 2011 'humanitarian' intervention. The analytical point here is merely to suggest that the Security Council omissions, as well as ambiguity within Council resolutions, should be incorporated into any analysis of the Security Council's accountability deficits.

Conclusion

[287] Letter from the Secretary-General addressed to the President of the Security Council (1 November 2016) UN Doc S/2016/924, para 19(a).
[288] See, further, The Kigali Principles on the Protection of Civilians (High-level International Conference on the Protection of Civilians, Rwanda, 28-29 May 2015) <http://www.globalr2p.org/resources/985>, a set of eighteen pledges for the effective implementation of protection of civilians mandate in UN peace operations, adopted by the same states.
[289] See statements made by the representatives of Germany and the United States in UN Doc S/Pv.6627 (4 October 2011) at 8; the representatives of Togo and the United Kingdom in UN Doc S/Pv.6711 (4 February 2012) at 7 and 12; and the representatives of France, Germany, Guatemala and the United Kingdom in UN Doc S/PV.6810 (19 July 2012) at 3-4 and 9.
[290] UN News, UN Human Rights Chief Urges General Assembly to Act Now to Protect Syrians (13 February 2013) <https://news.un.org/en/story/2012/02/403102-un-human-rights-chief-urges-general-assembly-act-now-protect-syrians>

The effective functioning of the Charter-based collective security system requires stable relationships between member states, especially permanent members of the Council. For the first 45 years of its history, however, members of the Council routinely struggled to find consensus on matters relating to the invocation of Chapter VII enforcement measures, predominantly due to political differences. Co-operation between the then Soviet Union and the United States, in particular, proved impossible and hence the collective security system, as originally envisaged, was never fully realised. Article 27(3) was used 279 times between 1945 and 1985. In the period from 1946 until 1970 it was almost exclusively the USSR that prevented the adoption of resolutions by the Security Council. In 1970 the United States made its first veto, and from then on came to replace the Soviet Republic as overwhelmingly the main user of the veto.[291] It was not only the actual use of the veto that contributed to Security Council inaction during this period; threats to use the veto also prevented the adoption of resolutions or secured their revision to something more acceptable to the permanent member concerned. During the entire timespan of the Cold War, the Security Council expressly determined that a breach of the peace existed on just three occasions: the Korean War,[292] the Falkland Islands War[293] and the Iran-Iraq War.[294] The action against Korea in 1950 was the only use of force authorised by the Security Council. The resolution was passed under Chapter VII in response to North Korea's invasion of the Republic of Korea. However, its successful passage was only as a result of the absence of the Soviet Ambassador to the Security Council, due to a dispute over the rightful representation of China at the United Nations that permitted the Security Council to take action. Due to these rather fortuitous set of circumstances, Richard Falk has argued, correctly, that the Korean example represents 'an anomaly rather than a precedent'.[295]

In the words of Sergey Lavrov, Permanent Representative of the Russian Federation to the United Nations:

> The veto is indeed a critically important and indispensable component of the mechanism of harmonizing positions and decision-making in the Council. The existence of the institution of the veto, its, so to say, political and psychological

[291] See Bailey and Daws (n 118) 272-3.
[292] UNSC Res 82 (25 June 1950) UN Doc S/RES/82.
[293] UNSC Res 502 (3 April 1982) UN Doc S.RES/502.
[294] UNSC Res 598 (20 July 1987) UN Doc S.RES/598.
[295] Falk (n 68) 625.

> effect help, to a very high degree, to ensure a balanced nature of the Council decisions.[296]

Hurd is correct that, as a result of the great power veto, the Council 'oscillates between complete irrelevance and imperial domination, with Great-Power consensus providing the switch that determines which condition obtains on an issue'.[297] History also seems to oscillate. The current impasse in Syria is, in some ways, reminiscent of the disparity between the reaction to the situation in Somalia, in which the Council asserted that 'the magnitude of the human tragedy' warranted the use of force under Chapter VII, and that of Rwanda. Vis-à-vis the extension of the idea of a threat to *international peace and security* in Somalia, Simon Chesterman suggests that 'the difficulties in backing up this rhetoric with action subsequently made it more cautious'.[298] To Chesterman, 'Rwanda was probably a casualty of such action'.[299]

It transpires, therefore, that the three dimensions of the Security Council's accountability deficit inter-relate in complex, but important ways. The long years of almost complete dormancy, and hence inaction, during the Cold War had initiated certain existential questions relating to the very capacity of the Security Council to fulfil its role in relation to the maintenance of international peace and security. This inaction undoubtedly goes a long way in explaining the manner in which the Council substantially extended its use of forcible and non-forcible enforcement measures once the permanent members were finally released of the shackles of paralysis. The controversies associated with the Council's subsequent use of its Chapter VII powers have, however, produced something of a pushback from states. To be sure, certain aspects of the Council's activity, for example, the 1267 sanctions regime, have been largely unaffected and continue to thrive (and court controversy). However, the Council's capacity to take forcible measures, especially in regard to humanitarian crises, has essentially ground to a halt. As we have seen, Russia and China have increasingly used their veto to thwart the invocation of Chapter VII measures. This chapter has identified two symptoms of the (re)turn to relative paralysis. The first is the trend towards ambiguity in Security Council

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[296] Sergey Lavrov (Permanent Representative of the Russian Federation to the UN), Statement to the General Assembly Working Group on the Security Council (22 May 1996) https://www.globalpolicy.org/security-council/security-council-reform/32866-sergey-lavrov-may-22-1996.html (cited in Ian Clark, *Legitimacy in International Society* (Oxford University Press 2005) 169).

[297] Ian Hurd, 'UN Security Council: Future Prospect for a Compromised Hegemon' (8 November 2016) *E-International Relations* https://www.e-ir.info/2016/11/08/un-security-council-future-prospects-for-a-compromised-hegemon/

[298] Chesterman, *Just War* (n 130) 140.

[299] Ibid; see, similarly, Gray, *International Law and the Use of Force* (Oxford University Press 2008) 292.

resolutions which fall short of authorising the use of force but contain language that we would otherwise associate with such resolutions. The second is the failure, in other instances, to take any measures at all. One of the main consequences of ambiguity and inaction has been a (re)turn to unilateralism. Unilateralism, by definition, runs contrary to the functional rationale of collective security (multilateralism) which underpinned the establishment of the Security Council in 1945. In conclusion, paradoxically, extensions to the Council's mandate tend to be accepted according to the logic that they further the telos of the United Nations, but it is these very extensions that give rise to deleterious consequences (unilateralism) for that very teleology.

With these accountability deficits brought to attention, the next chapter addresses the meaning of accountability on a conceptual level in order to ascertain whether the concept itself has the capacity to accommodate each dimension of the Council's accountability deficits.

Part II. Theory

II. Conceptualising Accountability

> Those engaged in the study of accountability often feel as if they are dealing with a holographic illusion. On the one hand, the subject of our attention seems present everywhere we turn, as a normative standard of political and social life and the focus of considerable attention no matter where one looks. On the other hand, despite the many efforts to define or describe it – to get at its conceptual essence so that we might grasp it in order to get its measure – the object of our obsession eludes us…[1]

Introduction

The purpose of this chapter is to address the underlying question, *what do we mean by accountability*? Jutta Brunée observes that 'notwithstanding its increasingly frequent invocation by international lawyers, the concept of "accountability" has not acquired a clearly defined legal meaning'.[2] Despite its increasing use of the term, the Council has neither advanced nor endorsed a specific understanding or definition of what accountability means.[3] The absence of an accepted definition is not constrained to international law; it is also evident on a broader conceptual plane. This is somewhat surprising considering the widespread usage of the term in everyday language.[4] The concept of accountability means many different things to different people and in different contexts; it reflects a range of differing understandings rather than a single paradigm. With no fixed technical meaning attached to its invocation, and with its advocates often sub-consciously (and, rarely, consciously and explicitly) bringing to bear their own conceptual and political baggage, accountability is an increasingly problematic notion.

Waldron states that it is common, when dealing with essentially contested concepts, to cite lists of attributes that stand in a 'family-resemblance' relation to one another.[5] Indeed,

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[1] Melvin J Dubnick, 'Accountability as a Meta-Problem' (2008) (Presented at 'The Future of Public Administration, Public Management, and Public Service Around the World, Lake Placid 5-7 September 2008) http://mjdubnick.dubnick.net/papersrw/2008/Dubnick%20MIII.pdf

[2] Jutta Brunnée, 'International Legal Accountability through the Lens of the Law of State Responsibility (2005) 36 *Netherlands Yearbook of International Law* 21, 22.

[3] Jeremy M Farrall, 'Rule of Accountability or Rule of Law? Regulating the UN Security Council's Accountability Deficits' (2014) 19(3) *Journal of Conflict and Security Law* 398, 401.

[4] Although, cf Robert Koehane, The Concept of Accountability in World Politics and the Use of Force' (2003) 24 *Michigan Journal of International Law* 1121, 1123, who suggest that 'there is a wide agreement on how to define accountability'.

[5] Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) 150.

accountability often serves as a conceptual umbrella covering various and distinct themes, such as, *inter alia*, liability, responsibility, sanction, transparency, efficiency, responsiveness, integrity and even democracy or the rule of law.[6] This presents a challenge, not only because it dilutes the conceptual clarity of accountability as a discrete concept, but because each of the aforementioned themes represents distinct concepts in their own right, and many are in fact umbrella concepts themselves.[7] A multi-disciplinary survey of the literature on the subject notes that accountability has been characterised variously as 'vague',[8] as 'murky',[9] as 'a slippery, ambiguous term',[10] as a 'protean concept',[11] as 'multifaceted',[12] as 'broad and flexible',[13] as 'a highly malleable term',[14] as 'a moving target',[15] as 'chameleon-like'[16] and as 'escaping prima facie any clear definition'.[17]

In order to address this conceptual ambiguity, this chapter begins in the abstract and seeks to establish a conceptualisation of accountability that is applicable at the highest level of conceptual abstraction, which will be applied to the practice of the Council in Part three of the thesis. In order to arrive at such a conceptualisation, the first section traces the etymology of accountability, noting the markedly different histories of accountability the 'word' and accountability the 'concept'. Section two draws out the dual function of accountability. The concept relates to the binary processes of 'giving an account' and 'holding to account'. Once

[6] Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 (4) *European Law Journal* 447, 450; Robert D Behn, *Rethinking Democratic Accountability* (Brookings Institution Press 2001) 3-6.
[7] Bovens, 'Analysing and Assessing' (n 6) 450.
[8] August Reinisch, 'Accountability of International Organizations According to National Law' (2005) 36 *Netherlands Yearbook of International Law* 119, 121.
[9] William T Gormley Jr, 'Accountability Battles in State Administration', in Carl Van Horn (ed), *The State and the States* (3rd edn, CQ Press 1996) 175.
[10] Patricia Day and Rudolf Klein, *Accountabilities: Five Public Services* (Tavistock 1987) 26.
[11] Mark Elliot, 'Ombudsmen, Tribunals, Inquiries' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press 2013) 233, 234; Jerry L Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance' in Michel W Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press 2006) 115, 115.
[12] International Law Association, 'Report on the Accountability of International Organisations' (Berlin Conference 2004) at 5.
[13] Deirdre Curtin and André Nollkaemper, 'Conceptualizing Accountability in International and European Law', (2005) 36 *Netherlands Yearbook of International Law* 4, 16.
[14] Elizabeth Fisher, 'The European Union in the Age of Accountability' (2004) 24(3) *Oxford Journal of Legal Studies* 495, 512.
[15] Kevin P Kearns, 'The Strategic Management of Accountability in Non-Profit Organizations: An Analytical Framework' (1994) 54 *Public Administration Review* (2) 187, 187.
[16] Amanda Sinclair, 'The Chameleon of Accountability: Forms and Discourses' (1995) 20 *Accounting, Organizations and Society* 219.
[17] Gerhard Hafner, 'Accountability of International Organizations ─ A Critical View' in Ronald St John Macdonald and Douglas M Johnston (eds), *Towards World Constitutionalism: Issues in The Legal Ordering of The World Community* (Nijhoff 2005) 585-586.

this is clarified, it is possible to arrive at a minimalist definition of accountability, based on three dimensions (transparency, standards and sanction). Section three identifies a number of antinomies that remain in relation to the form of accountability, even if the three dimensions of accountability are accepted. The final section of this chapter will pinpoint a specific question which it is argued has yet to receive sufficient attention. Or, closer to the truth, a question which has lain somewhat dormant as a consensus seems to have developed that accountability is predominantly a retrospective measure. The overriding argument of the chapter is that the complex and contradictory nature of the concept of accountability often blinds commentators to its normative value. Not only can accountability be used as an analytical lens that may help to capture certain relationships of power better than other concepts, but there is scope to conceive accountability even more broadly. In addition to viewing accountability as an *ex post facto* response mechanism (its 'fire-fighting' role), which is essentially retrospective and backward-facing, it is argued in this chapter that there is unchartered potential to conceive accountability as an on-going, iterative *process* (the 'fire-watching' role), which is equally prospective, and forward-facing in nature.

1. Etymology

1.1. Accountability: Distinguishing a Word and a Concept

In order to conceptualise accountability, it is illustrative to trace both its etymology in the English language and its usage in other languages. Interestingly, Melvin Dubnick notes that the etymology of accountability 'the word' does not encompass accountability 'the concept'.[18] In its historical context, accountability 'the word' is closely related to accounting. In fact, it literally derives from bookkeeping and finds its roots in the technical, professional idea of financial accounting and audit.[19] In the English language, Middle English terms related to accountability, such as *acompte* and *aconte*, can be traced to the early fourteenth century. References to the idea of 'being accountable', such as *accomptable*, find increased usage from the mid-fifteenth century.[20] Although Mark Bovens points to a comment circa 1260 related to

[18] Melvin J Dubnick, 'Seeking Salvation for Accountability' (2002) (*Annual Meeting of the American Political Science Association*) 3; see also, Melvin Dubnick, 'Clarifying Accountability: An Ethical Theory Framework' in Charles JG Sampford, Noel Preston and Carol-Anne Bois (eds), *Public Sector Ethics: Finding and Implementing Values* (Routledge 1998).
[19] Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* (4) 447, 448.
[20] Ibid. Such usage is clearly derived from the Old French equivalents for 'provide a count': *comptes à rendre.*

giving an account of one's conduct, the first noted reference to 'accountability' itself was not recorded until 1794.[21]

Accountability is essentially an Anglo-American term, not least because other languages, such as French, Portuguese, Spanish, German, and Dutch have no exact equivalent and do not distinguish semantically between notions of 'responsibility' and 'accountability'.[22] In French, the cluster of ideas surrounding accountability may be found in the classical *responsabilité*; the verb *rendre compte*, used in the sense of 'account for';[23] and *tenir compte de* in the sense of 'take into account'.[24] In Japanese, there are at least seventeen distinct terms used to communicate the word 'responsibility' but only one equivalent term to 'accountability' (*akauntabiritti*).[25] For northern European languages (Dutch, Danish, German), in contrast, translations of accountability are closer in meaning to 'duty' or 'obligation' ─ for example, 'accountability is an obligation or duty to live up to certain standards'.[26] Russian and Finnish translations also rely on terms much closer to 'obligation' in meaning, although the same terms are used for responsibility as well. However, while one may feel an obligation or duty to be accountable, accountability itself does not denote either per se.[27] In the same vein, there does seem to be a wide enough demarcation between accountability and responsibility to warrant a distinction, as will be discussed in more detail.[28] In short, while the idea can be expressed in other languages, the English language is somewhat unique in having created a single term that signifies accountability and applies it to an institutionalised context.[29] In reference to this phenomenon, Dubnick notes the problem of 'incommensurability' ─ the inherent lack of a common 'language' that permits easy translation of the word across contexts and cultures. While using accountability, the 'word', this thesis will take specific note of the fact that any understanding of accountability is thus dependent on cultural, contextual and linguistic factors.

[21] Ibid.
[22] Ibid. See also ILA Report (n 11) at 5.
[23] Robert O Keohane, 'The Concept of Accountability in World Politics and the Use of Force' (2003) 24(4) *Michigan Journal of International Law* 1121, 1123-4; Dubnick, 'Clarifying Accountability' (n 18) 70.
[24] Carol Harlow, *Accountability in the European Union* (Oxford University Press) 14.
[25] Although Dubnick disregards this as a transliteration of the English word adopted in light of extensive contact with British and American culture. Dubnick, 'Seeking Salvation for Accountability' (n 18) 14.
[26] Ibid.
[27] Dubnick, 'Clarifying Accountability' (n 18) 68.
[28] See, further, chapter 4, section 1,
[29] Dubnick, 'Clarifying Accountability' (n 18) 68.

While accountability the 'word' emerges as a Middle-English term, accountability the 'concept' has a much longer history and can be traced to ancient settings and even includes biblical references.[30] However, commentators seemingly agree that the linking of the word to the modern conceptualisation of accountability occurred under the rule of William I of England, who in the decades after the 1066 Norman conquest of England required all the property holders in his realm to render *a count* of what they possessed.[31] These possessions were listed in the so-called Domesday Books, which 'accounted' for all the property in the king's realm. In addition, William I had all the landowners swear oaths of allegiance. By the early twelfth century this had evolved into a highly centralised administrative system that was ruled through centralised auditing and semi-annual account-giving.[32]

Accountability 'the concept', thus, has firm historical roots in post-Norman Conquest England and is closely related to the emergence of this historically distinct form of governance, one that created a unique relationship between decision-makers and the people, based on norms and values established (or imposed) by those who exercise power.[33] Over the subsequent centuries, the concept has evolved, in a manner that reflects predominantly Western political culture and liberal democratic ideals. While it may have been assumed, in an age of inherited headships of government, that individuals were accountable to the sovereign, the Enlightenment brought with it the idea that legitimate government is conducted, even if not directly by the people, then nonetheless in their interest.[34] In a critically important move, however, in the centuries since the reign of William I, as Bovens has observed, the accounting relationship has almost completely reversed, to the extent that accountability does not refer to sovereigns holding their subjects to account, but to the reverse, 'it is the authorities themselves who are being held accountable by the wider community'.[35] In contemporary usage, accountability 'the concept' refers not to the power of an institution to 'hold to account' those over whom it wields authority. In contrast, it refers to the process of holding power 'to account'. As such,

[30] See, eg, Jon Elster, 'Accountability in Athenian Politics' in Adam Przeworski, Susan C Stokes and Bernard Manin (eds), *Democracy, Accountability and Representation* (Cambridge University Press 1999) 259-276.
[31] Dubnick 'Seeking Salvation for Accountability', (n 18) 7-9; Bovens, 'Analysing and Assessing', (n 19) 448-449.
[32] Ibid; see also, Mark Bovens, 'Public Accountability' in Ewan Ferlie, Laurence Lynne and Christopher Pollitt (eds), *The Oxford Handbook of Public Management* (Oxford University Press 2005) 182.
[33] Ibid 9.
[34] Nicholas Bamforth and Peter Leyland, *Accountability in the Contemporary Constitution* (Oxford University Press 2013) 1. See, generally, Bovens, 'Analysing and Assessing', (n 19) 448–9; Colin Scott, 'Accountability in the Regulatory State' (2000) 27(1) *Journal of Law and Society* 38, 39; Harlow (n 24) 14–15.
[35] Bovens, 'Analysing and Assessing', (n 19) 449.

accountability the 'concept' incorporates a duality of ideas: it is both a moral endeavour and, increasingly, an institutional obligation.

We can see, therefore, that the historical development of accountability the 'word' and accountability 'the concept' follow divergent paths. It is important to note the distinction between the two, because understandings of the 'word' and the 'concept' differ significantly, and because the problem of semantic ambiguity becomes apparent when accountability is treated solely as a 'word' rather than the wider 'idea' or 'concept'.[36] Hirohide Takikawa has noted the 'concept of accountability may have the proper sense even in those languages that have no word equivalent to accountability'.[37] It could be argued that the absence of a literal translation of accountability the 'word' outside of English speaking countries does not necessarily diminish its global significance if the emphasis of the discussion shifts from the 'word' to the 'concept'.

The Report of the International Law Association on the Accountability of International Organisations suggests that accountability can take many forms, which may be 'legal, political, administrative or financial'.[38] To be sure, these various forms are no less subject to the criticism that each relies on a different understanding of accountability – and thus subject to the same problems of ambiguity and incommensurability that plague accountability. But those seemingly distinct conceptualisations of accountability have the advantage of what Dubnick calls 'family resemblances' – they are related not by a common definition (which would reduce the 'concept' to a 'word') or some common property, but by the relatedness we 'see' in them, as we would see some resemblance among a group of very distinct individuals who are part of a family.[39] Each form of accountability is viewed as sufficiently related so as to fall under a broad understanding of accountability the 'concept'. Therefore, viewing accountability solely as a 'concept' allows us to incorporate the range of ideas associated with accountability the 'word' while maintaining the distinctiveness of the term.

[36] This point is best highlighted by Theo Brooks, *Accountability: It All Depends on What You Mean* (Akkad Press 1995). See also, Dubnick, 'Seeking Salvation for Accountability' (n 18) 3.
[37] Hirohide Takikawa, 'Conceptual Analysis of Accountability: The Structure of Accountability in the Process of Responsibility' in Sumihiro Kuyama and Michael Fowler (eds), *Envisioning Reform: Enhancing UN Accountability in the 21st* Century (United Nations University Press 2009) 75.
[38] ILA Report (n 11) at 4.
[39] Dubnick, 'Seeking Salvation for Accountability' (n 18) 6.

1.2. Accountability: An Expanding Yet Elusive Concept

We have observed the divergent paths taken by accountability 'the word' and accountability 'the concept', and the analytical benefits that can be drawn from viewing accountability as an 'idea' or 'concept'. We should also note that since the late twentieth century, a transformation has occurred from the traditional bookkeeping function of accountability in public administration to a much broader form of public accountability.[40] This notion of public accountability is closely associated with the tendency to seek to 'democratise' social relations. In this light, Richard Sklar asserts that 'the norm of accountability appears to be the most widely practiced of democratic principles'.[41] Its association with democracy goes some way to explaining the centrality afforded to discourses on accountability in constitutional theory, in particular. Anne Davies states that 'accountability is a central value of modern constitutions'[42] and Carol Harlow even suggests that accountability has 'joined the classical trilogy of sovereignty, rule of law and separation of powers as a directive principle of constitutional law.[43] Nevertheless, this transformation has not been without its controversies. The aggrandisement of the concept to the central plane of the constitutional debate has, to a certain extent, resulted in the expansion of accountability beyond its etymological meaning. Accountability is hence an extremely ambiguous, ever-expanding concept,[44] which 'has come to stand as a general term for any mechanism that makes powerful institutions responsive to their particular publics'.[45] In the words of Thomas Schillmans, 'accountability is one of these alluring concepts that are like fine old wine: they are full of depth and complexity, they have a "good feel", yet they are difficult to define in a conclusive way'.[46] Accountability, used in this generalised sense, can be little more than a political 'buzzword',[47] or a 'hurrah-word',[48] and can be said to be 'one of those golden concepts that, in principle, it is very difficult to be against'.[49] Bovens notes that 'what started as an instrument to enhance the effectiveness and

[40] Ibid. See also Harlow (n 24) 19.
[41] Richard Sklar, 'Developmental Democracy' (1987) 29(4) *Comparative Studies in Society and History* 686, 714.
[42] Anne CL Davies, *The Public Law of Government Contracts* (Oxford University Press 2008) 92.
[43] Harlow (n 24) 7.
[44] Richard Mulgan, '"Accountability": an Ever-Expanding Concept?' (2000) 78 *Public Administration* 555.
[45] Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave 2003) 8.
[46] Thomas Schillemans, 'Horizontal Accountability: A Partial Remedy for the Accountability Deficit of Agencies' (2009) *Presented at 5th Transatlantic Dialogue 'The Future of Governance'* (Washington DC) 11.
[47] See, E Madalina Busuioc, *European Agencies: Law and Practices of Accountability* (Oxford University Press 2013) 44-64.
[48] Bovens, 'Public Accountability' (n 32) 182.
[49] Bovens, 'Analysing and Assessing' (n 19) 448.

efficiency of public governance, has gradually become a goal in itself', and 'an icon for good governance'.[50]

It is almost a truism in contemporary parlance to suggest that 'public decision-makers need to be accountable'.[51] The solution to crises, in any number of contexts, is presumed to be *more* accountability. But if the answer is more accountability, it is not immediately clear what more accountability entails. It is these very evocative powers which also make accountability a very elusive concept because it can mean many different things to different people; it reflects a range of differing understandings rather than a single paradigm.[52] Accountability has discipline-specific meanings, for example, auditors discuss accountability as if it is a financial or numerical matter, political scientists view accountability as a political imperative and legal scholars as a constitutional arrangement, while philosophers treat accountability as a subset of ethics.[53] Interpreting accountability as an umbrella concept can make it very difficult to establish empirically whether an institution is subject to accountability because the various elements of the concept cannot be measured against the same scale. Accountability in its widest sense is thus an 'essentially contested and contestable concept',[54] because there is no general consensus about the normative standards that constitute 'accountable' behaviour, and because these standards differ from actor to actor, role to role, time to time and place to place.[55] Amanda Sinclair has suggested that accountability as a concept appears to reside in a 'bottomless swamp', where the more definitive we attempt to render the concept, the murkier it becomes.[56] 'With friends like these', writes Dubnick, 'accountability has no "enemies"'.[57] It is, therefore,

[50] Ibid 449; see, further, Dubnick, 'Seeking Salvation for Accountability' (n 18) 11: 'accountability has taken on a "life of its own" as a symbol detached from any specific meaning, yet with the capacity to generate a response when put to rhetorical or iconic use'.

[51] The iconic status of the concept is illustrated clearly by a recent article by Matthew Flinders ─ who has dared to go against the grain and propose that, simply, accountability is not always a good thing ─ but acknowledges his solitary position in that camp in the title of the article. The almost exclusively positive connotations associated with the concept should not automatically mean that accountability is immune from critique. Flinders warns against the 'the danger of self-evident truths' and suggests that 'the fact that something is so widely believed does not make it correct.' Matthew Flinders, 'Dare to be a Daniel: The Pathology of Politicized Accountability in a Monitory Democracy' (2011) 43 *Administration and Society* 595.

[52] The term is appropriately characterised by one commentator as 'chameleon-like'. Amanda Sinclair, 'The Chameleon of Accountability: Forms and discourses' (1995) 20 *Accounting, Organizations and Society* 219.

[53] Ibid 221.

[54] Ibid. cf Flinders (n 51) 596.

[55] Bovens, 'Analysing and Assessing' (n 19) 450; see also, Fisher (n 14) 496, who makes for similar observations about the use of 'accountability' in the context of the European Union.

[56] Sinclair (n 16) 222. The author is referring to a similar statement made by Robert Dahl on understandings of power. Robert Dahl, 'The Concept of Power' (1957) 2 *Behavioural Science* (3) 201, 201.

[57] Dubnick, 'Seeking Salvation for Accountability', (n 18) 10.

necessary to elucidate a narrower, minimalist definition, in an attempt to heed the summons of Dubnick; to save the concept from its many advocates and friends.[58]

1.3. The Importance of the Sociological Perspective

The International Law Associations Report on the accountability of international organisations suggests that 'power entails accountability ─ that is the duty to account for its exercise'.[59] We depart therefore from the principle that all entities exercising public authority have to *account* for the exercise thereof.[60] Accountability is in this narrow sense an instrument to fetter discretionary public power; as Patricia Day and Rudolf Klein have suggested, 'one cannot be accountable *to* anyone, unless one also has responsibility *for* doing something.'[61] In short, A (the institution granted discretionary power) is responsible for B (the issue). In exercising its responsibility for B, A is accountable to C (an accountability forum). A is accountable to C because no authority is unfettered. According to this reflexive, sociological understanding, an actor can only be accountable to some 'other', not in the abstract or in isolation.[62] Any definition must, therefore, acknowledge the relationship between an organisation, the accounting actor, and what will be referred to as the accountability forum.

Andreas Schedler has conceptualised accountability usefully, defining it broadly as the 'concern for checks and oversight, for surveillance and institutional constraints on the exercise of power'.[63] Schedler claims that the accountability is a two-dimensional concept which encapsulates both answerability and enforcement. Answerability refers to both representativeness and transparency, the obligation to consult, inform and explain decisions; and to the capacity of independent accounting agencies to impose sanctions on power-holders who have violated their duties.[64] The precise identity of both the actor and the accountability

[58] Ibid 7.
[59] ILA Report, (n 11) at 5.
[60] Erika de Wet, 'Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review' (2008) 9 *German Law Journal* (11) 1987, 1987.
[61] Patricia Day and Rudolf Klein, *Accountabilities: Five Public Services* (Tavistock 1987) 5. See, Article 24(1), UN Charter (1945): 'In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'.
[62] Curtin and Nollkaemper (n 13) 10; cf John Gardner, 'The Mark of Responsibility' (2003) 23 *Oxford Journal of Legal Studies* 157, 157.
[63] Andreas Schedler, 'Conceptualizing Accountability' in Andreas Schedler, Larry Diamond and Marc Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999) 13, 13.
[64] Ibid.

forum will of course vary.[65] In the same mould, the accountability forum will assume different guises and may be internal or external. What is central to this conceptualisation, however, is that the two are distinct. In order to tease out the constitutive elements of accountability, it is illustrative to unpack the concept into its two broad dimensions, which can be distinguished as 'giving an account' and 'holding to account'.

The former view, 'giving an account', holds accountability as the act of disclosing behaviour and justifying behaviour, without more. In this sense, accountability could be perceived as synonymous with transparency.[66] However, while an element of transparency is instrumental for accountability, it does not constitute accountability in its complete form. In fact, transparency could be viewed as a 'false-synonym'. Open decision-making and freedom of information are very important prerequisites for accountability, because they may provide accountability forums with the necessary information. However, transparency is not enough to qualify as a genuine form of accountability, because transparency does not necessarily involve scrutiny.[67] As such, the latter view, 'holding to account', is a more demanding definition as it requires, in addition, the potential for the actor to face consequences. Colin Turpin purports that 'a duty to answer is something hollow if there are no apt procedures … for such 'calling to account''.[68] According to Turpin, the original, or 'core' sense of accountability is that associated with the process of being held 'to account' to some authority for one's actions.[69] However, this is not self-apparent.[70] To appreciate the sociological dimension of accountability, both of the twin processes of 'giving an account' and 'holding to account' need be incorporated.

Accountability is seen to be a dialectical activity, requiring answers, explanation and justification, while those holding to account engage in questioning, assessing and criticising. It thus involves open discussion and debate. Day and Klein, for instance, ground their analysis in the assumption that it is a social activity requiring a 'shared set of expectations and a common

[65] Although, as noted, the accountable actor will normally be someone or something with the capacity to exercise public power.
[66] Harlow (n 24) 7, for example, describes transparency as the 'alter ego' of accountability.
[67] Bovens, 'Analysing and Assessing', (n 19) 453.
[68] Colin Turpin, 'Ministerial Responsibility: Myth or Reality?' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (2nd edn, Oxford University Press 1989) 55-57.
[69] Mulgan, '"Accountability": an Ever-Expanding Concept?' (n 44) 555.
[70] cf Takikawa (n 37) 75, who suggests, to the contrary, that the act of explaining and justifying is the 'core' sense of accountability.

currency of justifications' including 'agreement about the language of justification'.[71] In their conclusion, they are drawn to the importance of dialogue between the various actors involved and assert that 'political deliberation . . . is at the heart of accountability.'[72]

The following, rather simplistic definition, points to this social and performative nature: 'accountability is a relationship in which an individual or agency is held to answer for performance that involves some delegation of authority to act'.[73] This definition, like most others, is subject to criticism for errors of commission and omission, but it provides a launching point for considering each of the characteristics we will discuss here. The two major factors it highlights are that accountability, first, involves a social relationship between at least two parties, and second, in which the demand or obligation for account-giving (answerability in this case) is accepted and expected by both parties. Implied in that simple definition is the idea that the accountable relationship exists for a reason or purpose – i.e., that it has a "function" in the overall scheme of social relations that sustains it over time. While we might argue over the teleological premise that underpins functionalist views, the functionalist premise appears self-apparent.

As discussed, the first basic notion of accountability points to a condition of having to answer to an individual or body for one's actions, or inactions.[74] In the process of establishing this condition, the dimension of 'holding to account' not only obliges actors to disclose information and justify behaviour but also requires the establishment of a social relationship between the actor and the accountability forum.[75] Maintaining a close link with its etymological and historical roots, Bovens reiterates that accountability should be viewed as a specific social relationship, as a 'relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences'.[76] That is, accountability is an intrinsically *relational*, and *sociological* concept.[77]

[71] Patricia Day and Rudolph Klein, *Accountabilities: Five Public Services* (Tavistock 1987) 5.
[72] Ibid 244.
[73] Dubnick, 'Accountability as a Meta Concept' (n 1) 2.
[74] Willems and van Dooren (n 122) 1014.
[75] Curtin and Nollkaemper (n 13) 7-8.
[76] Bovens, 'Analysing and Assessing' (n 19) 450.
[77] Keohane, 'The Concept of Accountability in World Politics and the Use of Force' (n 23) 1124;

However, while this definition has merit, it is not immediately clear what criteria the forum should use in passing its judgment. In the absence of objective criteria, we risk a 'cycle of unaccountability' whereby the accountability forum can only pass a subjective judgment, which provokes the need for a third accountability forum to judge their conduct, with the process continuing in a circular fashion. Dawn Oliver remarks that 'accountability cannot be effectively imposed if the criteria against which conduct is to be measured in the process of calling to account are not made clear'.[78] Indeed, it has been argued in some quarters that stand-setting is a vital element in the process of securing accountability.[79] Therefore, Allen Buchanan and Robert Keohane's definition is of particular value. The authors identify three core elements of accountability. First, standards that those who are held accountable are expected to meet. Second, information available to accountability-holders, who can then apply the standards in question to the performance of those who are held to account. Third, the ability of these accountability-holders to impose sanctions – to attach costs to the failure to meet the standards.[80] The following section will address each of these dimensions in turn.

2. Dimensions of Accountability

2.1. Transparency

The first dimension relates to the notion of 'giving an account'. According to Bovens, 'it is crucial that the actor is obliged to *inform the forum about his or her conduct* … Often, particularly in the case of failures or incidents, this also involves the provision of explanations and justifications'.[81] The need for information about whether the institution is meeting the standards that the accountability forum applies means that a degree of transparency regarding the institution's operations is essential to any form of accountability. There are two main elements to level one. First, the institution should 'give an account' in a transparent manner. In this regard, truly accountable actors should operate as glass houses; with information being made available that is both clear and accessible. Invoking an interesting image, Schedler

[78] Dawn Oliver, 'Standards of Conduct in Public Life – What Standards?' (1995) *Public Law* 497, 497.
[79] Harlow (n 24) 10.
[80] Allen Buchanan and Robert O Koehane, 'The Legitimacy of Global Governance Institutions' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 25, 51; cf Davies (n 42) 81, who follows a similar line of argument but divides these claims into elements, as opposed to three categories: the setting of standards; the obtaining of an account; the judging of such an account; and finally a decision about the consequences that arise from such a judgment.
[81] Bovens, 'Analysing and Assessing' (n 19) 451.

suggests institutions of accountability are 'vampires in reverse' … they can live only as long as they act in the daylight of the public sphere, and they crumble and die as soon as they enter the shadows of privacy and secrecy.[82] As noted, the principle of transparency is closely linked to accountability. If the exercise of power were transparent, there would be no need for holding anybody accountable. The demand for accountability originates from the opacity of power.[83] For example, in Jeremy Bentham's *Panopticon*, any pretence to exercise accountability is void: 'from its high centre, we can see everything and intervene anytime. We do not have to ask anything. We just watch and punish'.[84] But the opacity of power is not limitless. Ever since the Enlightenment (from Kant and Rousseau to Mills), access to information has been considered an important civil right. Immanuel Kant articulates in his *Perpetual Peace* the proposition that 'all actions which relate to the rights of other human beings are wrong if their maxim is not compatible with publicity'.[85]

Notwithstanding the above, it is clear that some policies and practices cannot succeed without secrecy. Robert Behn labels this the 'accountability dilemma'; a trade-off between accountability and efficiency.[86] It could be argued that if an institution has been granted the responsibility for a particular issue, it is because it is the most suitable body to undertake that role. Overly demanding or complex accountability requirements can potentially suffocate the capacity of an institution. Matthew Flinders suggests that 'governing capacity is, therefore, a requirement of any political system ... We cannot bind the hands of politicians by placing more and more limits on their governing capacity, or by subjecting their every decision to forensic analysis, and then attack them for failing to govern with conviction or take decisive action'.[87] In order to potentially alleviate the 'accountability dilemma,' the concept can be viewed as a conjunction of its compound elements: 'account' and 'ability'. In this sense level, one can be

[82] Schedler (n 63) 21.
[83] Ibid.
[84] See, Jeremy Bentham, 'Panopticon', in John Bowring (ed), *The Works of Jeremy Bentham* (volume IV, Russell and Russell Inc 1843).
[85] Immanuel Kant, 'Toward Perpetual Peace (1975)' in Mary J Gregor (ed), *Practical Philosophy* (Cambridge University Press 1996) 311, 347.
[86] Behn (n 6).
[87] Matthew Flinders, 'Dare to be a Daniel: The Pathology of Politicized Accountability in a Monitory Democracy' (2011) 43 *Administration & Society* 595, 599. This resonates with Hood and Heald's questioning of the link between transparency and 'good governance'. Christopher Hood and David Heald, *Transparency: The Key to Better Governance?* (Oxford University Press 2006). See also, in the field of psychology, the work of Philip Tetlock on the relationship between accountability and complexity of thought, which reveals in illuminating detail how individuals frequently make irrational decisions when they know they will have to justify their decisions in public. Philip Tetlock, 'Accountability and Complexity of Thought' (1983) 45 *Journal of Personality and Social Psychology* 74.

summarised as transparency in decision-making without the need to sacrifice effectiveness.[88] But there is one condition, while publicity has its limits, even 'those limits themselves must be publicly affirmed'.[89] We can label this 'the paradox of publicity':[90] even the limits of publicity must be public.

Second, and linked to the accountability/efficiency dichotomy, in practice, high levels of effectiveness often assure that sleeping (watch)dogs lie quietly, and adherence to principles of good governance become somewhat less pertinent.[91] This process especially applies in times of great uncertainty and crisis. If immediate action is required, the call for effectiveness eclipses accountability processes. We may, therefore, accept an unaccountable institution as long as it performs its job well. However, this is not accountability in its complete form. The obligation to explain and justify decisions should be viewed as the gateway provision which provides an opening to levels two and three. As all three levels need to be present for an accountability relationship to exist, the final point to stress is that explaining and justifying decisions is an *obligation* placed upon the institution, and is not a voluntary undertaking.

2.2. Standards

When discussing accountability, the focus is rarely on standard setting.[92] However, accountability understood is this narrow way is not sufficiently dynamic, given that in some cases there is serious disagreement about *how* such a judgment should be rendered. The question thus shifts to what the *terms of accountability* ought to be. What standards of accountability ought to be employed? Whose interests should the accountability forum represent? Davies' first element, the imposition of standards, or criteria, against which the accountability forum can judge the performance of the accountable actor, is therefore potentially the most important aspect of accountability the concept. Oliver explains that, to her, '[Accountability] is about requiring a person to explain and justify ─ against criteria of some kind ─ their decisions or acts, and then to make amends for any fault or error.[93] If standards, values, and principles are not contained in the very notion of accountability, then at the very

[88] Takikawa (n 37) 92.
[89] Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press 1996) 96.
[90] Takikawa (n 37) 93.
[91] Ibid 78.
[92] Davies (n 42) 81.
[93] Dawn Oliver, 'Law, Politics and Public Accountability: the Search for a New Equilibrium' (1994) *Public Law* 238, 246.

least they are an essential aspect of its context, setting in place the framework against decisions can be assessed. These standards have an important role to play in determining the scope of the accountability process; they define which aspects of the relevant body's responsibilities are covered by accountability processes, and implicitly, which are not.[94]

However, the criteria imposed should not be rigid, but susceptible to an on-going process of renewal. Even when the criterion is explicit, it must still be interpreted; applying the standards to the facts involves a continuous process of standard-setting.[95] Anne-Marie Slaughter articulates the importance of standard-setting in the accountability process:

> [Organisations] must give reasons for their actions in terms intelligible to a larger public; and they must be able to formulate arguments in sufficiently general, principled, 'other-regarding' ways to be able to win the day in a process of deliberative decision-making. Operating in a world of generalizable principles, however, requires a baseline of acceptable normative behaviour ... At the loftiest level, these principles could be understood as part of a global trans-governmental constitution – overarching values to steer the operation of government networks.[96]

The author goes on to claim that 'the content of these specific principles is less important in many ways than the simple fact that there be principles – benchmarks against which accountability can be measured'. This is because the original rationale behind calls for accountability is to provide a buffer against arbitrary power, to fetter the use of discretionary power. As a corollary to standard-setting, the importance of objectivity is often overlooked. As Mulgan has noted ─ 'no analysis of accountability can pretend to be wholly without ulterior purpose'.[97] Fisher acknowledges, behind every proposal to make decision-making more accountable lies a different theory of good governance.[98] Making decision making transparent is often a way of imposing a different framework onto decision-makers by requiring them to carry out an assessment they would not have otherwise been required to do.[99] An argument for more accountability is, in essence, an argument about wanting to align a decision to a particular normative vision.[100] It is important to acknowledge the normative dimension of accountability.

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[94] Davies (n 42) 82.
[95] Ibid 83.
[96] Anne-Marie Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks' (2004) 39(2) *Government and Opposition* 159, 190.
[97] Mulgan, '"Accountability": an Ever-Expanding Concept?' (n 44) 556.
[98] Fisher (n 14) 511.
[99] Ibid.
[100] Ibid 513.

A discussion of accountability in the United Nations cannot be disentangled from a discussion about what is and what should be the role and nature of the organisation.

To help ensure this dimension of accountability, it may be worthwhile to draw on procedures of administrative law at the domestic level.[101] Global administrative law has been defined as:

> Comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions [public bodies] make.[102]

Conceptualising international organisations as constituting an 'inter-public' arrangement,[103] provides a bridge to make analogies with the domestic setting. Expanding on the meaning of 'public', as a primary observation, we can say that the collective security regime is an arrangement created by states – the archetypal and primary public authorities in the international arena – and one that regulates the relations between states. The Security Council is a political association of states; an 'inter-public' arrangement.[104] The term 'public' also has a normative dimension. It refers to the 'institutions, rules principles and practices according to which the authority of the Security Council is constituted, is maintained and is exercised, in order to attain the goal for which it has been created'.[105] This goal is stated in Article 1(1) of the Charter: it is the maintenance of international peace and security. The consequence of this is that the function of collective security emerges as a source of the 'publicness' of the Security Council, not just a component thereof. That is, the Security Council exists to deliver global public goods; namely international peace and security. Individual states do not have the ability or resources to secure international peace and security for the whole, 'the intervention of a public authority is required'.[106] As stated in the Report of the High-Level Panel, 'A More Secure World': 'all States have an interest in forging a new comprehensive collective security

[101] Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15.
[102] *Ibid* 17.
[103] See, Benedict Kingsbury, 'International Law as Inter-Public Law' in Henry S Richardson and M S Williams (eds), *Moral Universalism and Pluralism* (New York University Press 2009).
[104] Nicholas Tsagourias and Nigel D White, *Collective Security: Theory, Law and Practice* (Cambridge University Press 2013) 20-21.
[105] Ibid 21.
[106] Ibid.

system that will commit all of them to act cooperatively in the face of a broad array of interests'.[107]

The 'public-ness' approach proposes that international law be conceptualised as a law between 'public entities' (primarily, but not limited to, states); these public entities being subject to law and thus to basic public law principles, including legality, rationality, proportionality, the rule of law, and fundamental rights.[108] We could point to an additional quality of 'public-ness' inherent in law, one that is difficult to define but nevertheless crucial.[109] As described by Jeremy Waldron, this public character of law:

> '[L]ies in the fact that law presents itself not just as a set of commands by the powerful [or] a set of rules recognized among an elite, but as a set of norms made publicly and issued in the name of the public … that ordinary people can in some sense appropriate as their own, qua members of the public'.[110]

Accountability is thus the process of, where possible, conditioning authority to align with the public interest. 'Public interest' therefore provides the source for obtaining the pre-determined objective standards against which the accountability forum is vested power to pass judgment.

2.3. Consequences

The inclusion of this third dimension, the potential for the actor to face consequences, in the core sense of accountability is contestable, as it may appear to go beyond the traditional notion of 'giving an account'. As previously discussed, some commentators view 'answerability' as constitutive of accountability. Processes of accountability that do not impose material consequences usually appear, according to Schedler, as 'weak, toothless, diminished forms of accountability. They will be regarded as acts of window dressing rather than real restraints on

[107] Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2 December 2004) UN Doc A/59/565, at para 28.
[108] Benedict Kingsbury and Megan Donaldson, 'From Bilateralism to Publicness in International Law' in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer and Christoph Vedder (eds) *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 83.
[109] Benedict Kingsbury, 'International Law as Inter-Public Law' in Henry S Richardson and M S Williams (eds), *Moral Universalism and Pluralism* (New York University Press 2009) 167.
[110] Jeremy Waldron, 'Can There Be a Democratic Jurisprudence?' (2009) 58 *Emory Law Journal* 675, 684.

power'.[111] To this author, this quasi-voluntary version of accountability is an example of 'accountability light'. Schedler concludes that 'inconsequential accountability is no accountability at all ... Unless there is some punishment for demonstrated abuses of authority, there is no rule of law and no accountability'.[112] Anne Davies likewise states that 'if the enforcement measures for an accountability process are wholly ineffective, this might cast some doubt on whether it is right to apply the label 'accountability process' at all'.[113] In the broader sense, Christopher Rude and Sara Burke argue that 'accountability without sanctions for institutional failure is not meaningful if the objective … is to create more socially responsible and democratic institutions'.[114] Oliver elaborates her concept of accountability when she says that is 'has been said to entail being liable to be required to give an account or explanation of actions and, where appropriate, to suffer the consequences, takes the blame or undertakes to put matters right if it should appear errors have been made. In other words, it is explanatory and amendatory'.[115]

While there is a growing body of literature advocating the imposition of sanctions for non-compliance with accountability processes, it is important to distinguish between sanctions and the broader consequences in this context. Sanctions obviously invoke a formal and legalistic connotation, whereas consequences are conceived in the broadest possible sense. Also, the term sanction implies a bias towards negative forms of scrutiny. Many accountability arrangements are not focused on finding fault, forums will often judge positively about the conduct of actors and will even reward them.[116] The more neutral expression, that the institution may *face consequences*, is, therefore, more appropriate. What I would strongly suggest though is that if we return to the demarcation between 'giving account' and 'holding to account', this second element (however broadly it is conceived) *is* necessary, as it marks the difference between the

[111] Andreas Schedler, 'Conceptualizing Accountability' in Andreas Schedler, Larry Diamond and Marc Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999) 15-16.
[112] Ibid 17.
[113] Davies (n 42) 85.
[114] Christopher Rude and Sara Burke, 'Towards a Socially Responsible and Democratic Global Economic System: Transparency, Accountability and Governance' (2009) 15 *Friedrich Ebert Stiftung Briefing Paper* 1, 3.
[115] Dawn Oliver, *Government in the United Kingdom, The Search for Accountability, Effectiveness and Citizenship* (Open University Press 1991) 22.
[116] As is acknowledged by Bovens, 'It [accountability] is used to qualify positively a state of affairs or the performance of an actor'. Bovens, 'Analysing and Assessing' (n 19) 450; see also Schedler (n 63) 15; Guillermo O'Donnell, 'Horizontal Accountability in New Democracies' in Andreas Schedler, Larry Diamond and Marc Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999) 29.

quasi-voluntary and selective provision of information and concrete examples of actually 'holding to account'.

To a certain extent, the ILA Report does recognise this distinction. The Report identifies three levels of accountability. First, external or internal scrutiny of the way international organisations perform their functions; secondly, liability for injury, damage, loss or death as a result of lawful acts and, finally, responsibility for unlawful acts.[117] One could surmise that the first level broadly relates to the notion of 'giving an account' while the second and third level to 'holding to account'. While the three levels suggested by the ILA ostensibly accept the conceptual dimensions of accountability, the decisions taken by the Members of the Committee bring to the fore two important conceptual questions that continue to energise accountability discourse. First, the Report suggests that scrutiny of an institution can derive from either an internal or an external source. Second, the Committee uses terms such as 'liable' and 'responsible' interchangeably with accountability, thus suggesting that accountability is an intrinsically legal idea. It is important to unpack both of these assumptions.

3. Accountability's Antinomies: Forms and Functions

Even if we are to accept the above three-dimensional approach, certain antinomies remain unaddressed. The first two antinomies relate to the *form* of accountability; specifically, whether internal scrutiny will suffice, or whether the concept of accountability necessitates that the accountability forum is answerable to a genuinely external actor.

3.1. Internal or External Scrutiny

It is questionable whether internal scrutiny should be accepted as constitutive of accountability, or whether the externality of the accountability forum is essential.[118] Takikawa, for example, argues that 'accountability is the obligation to explain and justify one's activities to 'others'. In other words, to account to 'oneself' is never considered accountability'.[119] In this view, the existence of 'others' is an essential component in the concept of accountability and

[117] ILA Report (n 11) at 5.
[118] For discussion on the merits of internal and external accountability, see, Dubnick, 'Clarifying Accountability', (n 18); Mulgan, '"Accountability": An Ever-Expanding Concept?' (n 44) 558-563.
[119] Takikawa (n 37) 90-1.

accountability is essentially external.[120] Accountability processes clearly demand some tension between the decision-maker and the accountability forum. As White and Hollingsworth note, albeit in a different context, 'the independence of an external auditor is vital to enable the auditor to perform his functions properly'.[121] In the 1940s, the Friedrich-Finer debate set the stage for the contemporary debate on the subject. Samuel Finer believed that accountability could only be guaranteed by maintaining hard external constraints, whereas Carl Friedrich argued that self-control is feasible based on a broader array of soft internal norms and values.[122]

There is a link here with the conceptualisation offered by Richard Mulgan, who also sees accountability as essentially external. Part of his 'core sense' of accountability is the implication of 'rights of authority', by which he suggests that external actors are 'asserting rights of superior authority over those who are accountable, including the rights to demand answers and to impose sanctions'.[123] In this view the accountability forum could be viewed as the 'principle', exercising control over the 'agent' (the institution) to which it has delegated authority. Indeed, some would equate accountability with controllability.[124] In this view, agents are accountable to principals only if the principal can influence the actions of the agent. However, there is a fine line between accountability and control. To control means to 'have power over' and it can involve very direct ways of regulating conduct and governing the decision-making process. But these mechanisms are not accountability mechanisms per se, because they do not operate through procedures in which actors are obliged to explain and justify their conduct. Going further than this, in order to establish the requirement to subject an actor to accountability mechanisms, the actor must initially be 'in control' of the decision-making process. If the actor does not control the decision-making process, there is no need for accountability. The function of accountability, therefore, is not to control but to scrutinise the

[120] Ibid 90; Mulgan, '"Accountability": an Ever-Expanding Concept?' (n 44) 555.
[121] Fidelma White and Kathryn Hollingsworth, *Audit, Accountability and Government* (Oxford University Press 1999) 91.
[122] Herman Finer, 'Administrative Responsibility and Democratic Government' (1941) 1 *Public Administration Review* 335; Carl Friedrich 'Public Policy and the Nature of Administrative Responsibility' in Carl Friedrich and Edward Mason (eds), *Public Policy* (Harvard University Press 1940). For discussion on the Friedrich-Finer debate, see Tom Willems and Wouter van Dooren, 'Coming to Terms with Acountability' (2012) 14(7) *Public Management Review* 1011, 1013.
[123] Mulgan, '"Accountability": an Ever-Expanding Concept?' (n 44).
[124] See, eg, Arthur Lupia, 'Delegation and its Perils' in Torbjörn Bergman, Wolfgang C Müller and Kaare Strøm (eds) *Delegation and Accountability Parliamentary Democracies* (Oxford University Press 2003) 33, 35: 'an agent is accountable to a principal if the principal can exercise control over the agent'.

actor. In short, 'accountability is a form of control, but not all forms of control are accountability mechanisms'.[125]

Control is therefore not synonymous with accountability, which is less concerned by the externality of the accountability forum, or its hierarchical authority to control an institution, than by the independence and impartiality of the forum. Clearly, no institution can be entirely manageable from the outside.[126] In this regard, Hannah Arendt underlies the significance of what she terms as 'spectators', 'only the spectator occupies a position that enables him to see the whole; the actor because he is part of the play, must enact his part'.[127] Arendt continues: 'the public realm is constituted by the critics and the spectators, not by the actors or the makers'.[128] The reference to 'spectators' is potentially illuminative. It is imperative that the accountability forum is removed from active participation in decision-making, but a 'spectator' could be closely linked to an institution while still qualifying as independent.

In this regard, Takikawa advocates a strong and a relative distinction between internal and external accountability. Internal 'others' are members of the same organisation, who may fulfil an accountability role in the relative sense. The requirement of externality is fulfilled in the strong sense if one gives an account of their conduct to a person who is not a member of the same organisation.[129] Accountability is thus realised in its strongest sense by external scrutiny; however, defining internal scrutiny as scrutiny conducted by a member of the same organisation is unnecessarily constricting. In the context of the United Nations, such a finding would discredit the General Assembly or the International Court of Justice from constituting mechanisms of accountability towards the Security Council, as they are simultaneously institutions of the wider organisation. Andrea Bianchi explains that 'the design of the Charter is one of separation of functions … Each and every organ is supposed to operate *independently* of the others within their respective spheres of competence'.[130] Martti Koskenniemi has also

[125] Bovens, 'Analysing and Assessing' (n 19) 454.
[126] Not least the Security Council, which is essentially the 'master of its own procedure'. See, Antonios Tzanokopoulos, 'Transparency in the Security Council' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013) 367. Pursuant to Article 30, UN Charter (1945), 'the Security Council shall adopt its own rules of procedure'.
[127] Hannah Arendt, *Lectures on Kant's Political Philosophy* (University of Chicago Press 1982) 55.
[128] *Ibid* 63.
[129] Takiwawa (n 37) 75.
[130] Andrea Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion' (2006) 17(5) *European Journal of International Law* 881, 910 (own emphasis added).

argued that 'the Charter was meant to be based on a separation of functions. Therefore, usually, the Council and the Assembly operate *independently* of one another'.[131] Likewise, overall the doctrine of parallelism of powers and functions, developed by the International Court of Justice over time,[132] has been subject to little challenge. It thus emerges that independence, and not externality, is the fundamental defining element of the accountability forum. Thus, if we concentrate on the 'independence' of these institutions as opposed to their externality, there may be some scope to incorporate members of the same organisation into accountability processes in the relative sense.

3.2. Legal or Political Mechanisms

The second antinomy relates to legal or political forms of accountability processes.[133] Legal accountability refers to scrutiny and enforcement by courts of accountability standards, predominantly through the mechanism of judicial review. It might be proffered that legal accountability is the most unambiguous form of accountability, as legal scrutiny will be based on detailed, predetermined legal standards.[134] Bovens notes the increased relevance of legal scrutiny 'as a result of the growing formulation of social relations'.[135] Harlow, on the other hand, places greater emphasis on the independent nature of courts, and the greater trust this instils in the courts over, for example, legislative bodies.[136] Harlow, therefore, falls squarely in the 'external' category in the external/internal scrutiny debate, 'to secure true accountability, the introduction of a neutral third party (the judge) is necessary'.[137] She continues, 'only the intervention of an apolitical judiciary can secure any measure of … accountability.'[138]

[131] Martti Koskenniemi, 'The Police in the Temple: Order, Justice and the UN: A Dialectic View' (1995) 6 European Journal of International Law 325, 337 (own emphasis added).
[132] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3, at para 40; *Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, at para 95; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Provisional Measures) [1993] ICJ Rep 3, at para 33.
[133] See, Chapters 5 and 6 on the difference between legal and political forms of accountability, through the lens of legal and political constitutionalism.
[134] Bovens, 'Analysing and Assessing' (n 19), 456
[135] Ibid; see also, Behn (n 6) 56-58.
[136] Harlow (n 24) 18.
[137] Ibid 16.
[138] Ibid.

It is generally accepted that there are two main grounds for judicial review, which are closely linked to principles of accountability: (a) lack of competence; and (b) abuse of power.[139] The first ground, lack of competence, requires a court to assess the powers exercised by an institution and declare them *ultra vires* if they exceed those attributed to it.[140] Abuse of power, as a ground of review, requires scrutiny of the purpose for which the specific act has been adopted.[141] If, for example, a decision has been made only ostensibly for a declared purpose, it can be potentially annulled for abuse of power even if it is otherwise lawful.[142] Abuse of power as a ground of review has been described, in this sense, as being 'corrective' of arbitrary power.[143]

In states with strong traditions of judicial review, the law stands at the centre of the constitutional system of accountability, and constitutional courts play an active role in standard-setting and maintaining values.[144] These can be the 'ordinary' courts as in the United Kingdom, or specialised administrative courts as in France, Belgium and the Netherlands. Either way, these courts play a role in 'policing the boundaries of the constitution' and holding decision-makers accountable within this framework.[145] The role of the judiciary differs, however, depending on the jurisdiction. Classic French administrative law speaks of *contrôle juridictionnel de l'administration*. In Italian, the appropriate term is again *'controllo'.*[146] The same pattern is found in Belgium and the Netherlands, where 'control' is the term most prominent in public-law texts, used impartially to cover financial, political, and legal control. 'Whatever the terminology and whichever court has jurisdiction', writes Harlow, 'we can notice in every European jurisdiction how *control* has developed rapidly during the last century.'[147] However, such an assertion is questionable from the perspective of the United Kingdom. A softer stance towards judicial review is evident, which, in a way, emphasises the

[139] Nicholas Tsagourias and Nigel D White, *Collective Security: Theory, Law and Practice* (Cambridge University Press 2013) 258.
[140] This is traditionally difficult to prove in the context of the Security Council, see, *supra*. The ICJ has ruled that if the action is appropriate 'for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organisation'. *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 1962, 168.
[141] Tsagourias and White (n 139) 358-9.
[142] Ibid; see, further, *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 (dissenting opinion of Judge Fitzmaurice) at para 89.
[143] Tsagourias and White (n 139) 359.
[144] Ibid.
[145] Ibid.
[146] Harlow (n 24) 18 (own emphasis added).
[147] Ibid.

'review' element in that courts do not have the jurisdiction to override an Act of Parliament.[148] In the context of the Human Rights Act 1998 in the United Kingdom, for example, courts are not empowered to set aside legislation, merely to declare an action as 'incompatible' with the rights contained within the Act.[149] Therefore, legal accountability does not necessarily need to be synonymised with 'control'. The Human Rights Act in the offers an example of a system where courts have the power to scrutinise legislation against human rights standards (level two of the minimalist definition) but the process is not 'corrective'; in the sense that the courts are not exercising vertical accountability.[150]

On the contrary, it is arguable that political reality ─ rather than legal or constitutional constraints ─ are more likely to shape most accountability issues within an international organisation. The legal framework, therefore, provides more limited guidance in matters of international accountability than in the traditional domestic setting, which concerns the accountability of the component parts of governments.[151] It is also true that reliance on the courts invokes a preference for 'liability' which, as previously discussed, is more closely associated with 'responsibility'. There is thus scope to assess processes of political accountability. According to Oliver, political accountability is any form of accountability which exposes accountable actors to political censure, and (in certain contexts) electoral risk. Oliver draws on the United Kingdom's constitutional context, political accountability encompasses, for example, ministerial accountability to Parliament.[152]

There is, however, some conceptual ambiguity in the relationship between 'political', 'electoral' and 'democratic' accountability. Indeed, in democratic states, this form of accountability is performed by the 'demos' through the electoral process. General elections provide the electorate with the opportunity to pass judgement on past decisions and decide

[148] *Edinburgh & Dalkeith Railway* v *Wauchope* [1842] 8 Cl & F 710; *Pickin v British Railways Board* [1974] AC 765 HL.
[149] Section 4, Human Rights Act (1998).
[150] Indeed, while a declaration of incompatibility does not affect the validity of legislation, the UK Parliament in practice usually responds in some way. See, Ministry of Justice, Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government Response to Human Rights Judgments 2012-13 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252680/human-rights-judgments-2012-13.pdf>
[151] See, Michael Fowler, 'Bringing the Different United Nations to Account' in S Kuyama and MR Fowler (ed) *Envisioning Reform: Enhancing UN Accountability in the Twenty-First Century* (United Nations University Press 2009) 37, 45-46. Going one step further, Curtin and Nollkaemper (n 13) 16, group accountability other 'intrinsically non-legal concepts'.
[152] Oliver (n 115) 23-25.

whether they are worthy of reward or punishment. This is the core sense of 'holding to account'. However, where direct democratic accountability is not possible, the question is whether indirect democratic accountability is feasible. For Bovens, elections are only one component of political accountability. Likewise, Schmitter defines political accountability in a broader way in which elections are not a necessary aspect, indeed any accountability relationship between decision-makers and their constituents qualifies.[153]

Political accountability is indeed broader than electoral accountability and can be traced in the history of political philosophy. For Bentham and Mill, for example, liberal democracy was associated with establishing the political apparatus that would ensure accountability. It was argued that only through democratic government would there be a satisfactory means for generating political decisions commensurate with the public interest. As Bentham writes, 'a democracy … has for its characteristic object and effect … securing its members against oppression and depredation at the hands of those functionaries which it employs in its defence'.[154] Such a view ties in with the notion that accountability is owed to the wider public and which incorporates the obligation for institutions to explain and justify their actions.[155] Oliver explains that 'it is for their stewardship of the public interest that … institutions are in practice most commonly accountable, and by this criterion that they are judged.'[156] Michael Fowler coins 'popular accountability' to differentiate from direct democratic accountability. Popular accountability is the 'principle of locating governance at the lowest possible level ─ that closest to individuals and groups affected by the rules and decisions adopted and enforced'.[157]

The ILA Report, having listed the four forms of accountability, states 'a combination of the four forms provides the best chances of achieving the necessary degree of accountability',[158] advocating multiple accountability forums over the one-dimensional approach. As Mulgan states, 'a circle of spotlights uncovers more than is revealed by a single spotlight, however

[153] Philippe C Schmitter, 'The Ambiguous Virtues of Accountability' (2004) 15 *Journal of Democracy* (4) 47; cf. Grant and Keohane, who exclude electoral accountability from their list of accountability mechanisms because it is 'not relevant to contemporary global institutions'. Ruth Grant and Robert Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American Political Science* Review 29, 35.
[154] Jeremy Bentham, *Constitutional Code* (first published 1983) 47 (cited in David Held, *Models of Democracy* (3rd edn, Polity Press 2006) 75).
[155] Ibid 25-6.
[156] Oliver (n115) 23.
[157] Fowler (n 151) 60.
[158] ILA Report (n 11) at 5.

strong that single light may be'.[159] Likewise, Willems and Van Dooren has proposed that 'the more account-holders are involved in diverse accountability forums, the higher the chance that an actor is being called to account to some authority for one's actions'.[160] To the authors, 'this acid test of numerous overlapping 'fire alarms' is the best means for enforcing accountability'.[161] Following this line of reasoning, accountability overlaps between account-holders and forums increase the chance of being called to account to some authority for one's actions (compared to a clear division of tasks amongst them). It reduces the centrality of one particular actor and compensates for each other's flaws.[162]

3.3. Prospective or Retrospective Function

The final antinomy relates to the *function* of accountability. According to Davies, there are two main functions of accountability: to guard against the abuse of delegated power and to promote the efficient and effective performance of delegated duties.[163] In reference to the former, Keohane observes that accountability 'can be a useful tool to limit abuses of power'.[164] According to the Schedler, the raison d'etre of accountability can be encapsulated by its 'mission … to make power predictable by limiting its arbitrariness and to prevent or redress the abuse of power in order to keep its exercise in line with certain pre-established rules and procedures.[165] However, this first function, preventing abuses of power, necessitates an important qualification. We should be wary of placing undue faith in mechanisms of accountability. No checks can guarantee that standards are being met.[166] The latter function, the more constructive role for accountability processes in promoting effective performance has received less attention. As Normanton suggests:

> '[P]ublic accountability should not only provide administrative safeguards but should, by improving the flow and the quality of information, make an important

[159] Mulgan, *Holding Power* (n 45) 219.
[160] Willems and van Dooren (n 122) 1032.
[161] Ibid 1031.
[162] Ibid.
[163] See, Davies (n 42) 79.
[164] Robert O Keohane, 'Abuse of Power, Assessing Accountability in World Politics' (2005) 27(2) *Harvard International Review* 48, 48.
[165] Schedler (n 63) 19.
[166] Michael Power, *The Audit Society: Rituals of Verification* (Oxford University Press 1997); see, further, Schedler (n 63) 26: 'given that the notion of accountability is not built on the illusion that power is subject to full control and can be opened up to full transparency, but rather accepts and addresses the uncertainty and opacity of power, we characterized it as a modest concept'.

> contribution to the efficient conduct of government. Accountability can and should be *useful*'.[167]

We, therefore, arrive at a broader notion of accountability, which transcends preventing the abuse of power; but is also concerned about selecting legal and political forms which can best achieve 'the instrumental goals of collective choice'.[168]

Traditional models view accountability as a retrospective process where judgment is passed on results or actions already taken.[169] According to Fisher, accountability refers to a set of tools which can 'fix and stabilise a system,'[170] which implies that accountability is corrective by nature and processes of accountability are invoked to provide redress to a system that, by implication, is 'broken' or 'unstable'. Guillermo O'Donnell's seminal distinction between vertical and horizontal accountability is reflective of this orthodox position.[171] *Vertical* accountability refers to the situation where the forum formally wields power over the actor, for example, due to a hierarchical relationship.[172] Arrangements which are based on the delegation of power from principles to agents are forms of vertical accountability. Seemingly in support of vertical accountability, Michael Fowler has suggested that for an entity to be seen as properly accountable, duties must be defined, a clear and effective hierarchy must be established in which one entity brings another to account, an adequate accounting to an appropriate body must occur, the results of the external evaluation must be communicated effectively to the entity being evaluated and the assessment must then be absorbed and, ideally, acted upon in some productive manner.[173] Vertical accountability is concerned with the reassertion of control. It refers to a power to influence decisions. Control, that is to say, is exercised *a priori.*

To be sure, the conceptualisation of accountability which the drafters of the ILA Report arrived at is explicitly backwards facing. It identifies three levels of accountability: a) internal or

[167] EL Normanton, 'Public Accountability and Audit: a Reconnaissance', in Bruce Smith and Douglas Chalmers Hague (eds), *The Dilemma of Accountability in Modern Government: Independence versus Control* (Macmillan 1971) 338 (cited in Davies (n 42) 79).
[168] Davies (n 42) 80.
[169] See, eg, Behn (n 6).
[170] Fisher (n 14) 510.
[171] Guillermo O'Donnell, 'Horizontal Accountability in New Democracies' in Andreas Schedler, Larry Diamond and Marc Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999) 29.
[172] Bovens, 'Analysing and Assessing' (n 19) 460.
[173] Michael R Fowler, 'Bringing the Different United Nations to Account' in Sumihiro Kuyama and Michael R Fowler (ed) *Envisioning Reform: Enhancing UN Accountability in the Twenty-First Century* (United Nations University Press 2009) 37, 39.

external scrutiny of the way organisations perform their functions; b) liability for injury, damage, loss or death as a result of lawful acts c) responsibility for unlawful acts.[174] On the other end of the spectrum, it may be that a hierarchical relationship is generally lacking, but an actor may feel an obligation to render account for a social or moral reason. Such accountability could be termed *horizontal* accountability.[175] Conversely, horizontal accountability refers to the responsibility of the actor to respond, answer or account for actions already performed; this responsibility is retrospective or *a posteriori.*

There is of course overlap between the functions of controlling and calling to account. An *a posteriori* investigation, for example, may imply both acceptance of responsibility for and also 'responsiveness' to influence, persuasion and pressures for modifications which may affect future decisions.[176] The point is that both vertical and horizontal forms of accountability revert to the traditional understanding of accountability as a retrospective process. Thus, we note the emergence of a 'loosened up' approach (the rigid approach is control/sanction) to accountability, which argues that in complex and dynamic contexts, the reliance on vertical oversight and control will fail to ensure accountability because it is inflexible and formalistic. Furthermore, it tends to produce accountability systems that are risk-averse and retrospective in nature rather than pro-risk, and interactive.[177] It is here that we depart from the traditional understanding of accountability as limiting power, towards a broader conception. This conception is closely linked with the second function of accountability: promoting efficient and effective performance. Instead of viewing accountability forums as exercising solely a 'fire-fighting' function, there is scope to explore the capacity of these forums to simultaneously fulfil a 'fire-watching' role. This is a prospective, iterative process whereby forums do not seek to *limit* power, *per se,* but to *condition* its exercise in light of pre-determined standards.

Conclusion

This chapter has highlighted that the etymology of accountability 'the word' does not encompass accountability 'the concept'. As a word, the meaning of accountability is complex and contested and our understanding is hampered by 'incommensurability', the inherent lack

[174] ILA Report (n 11) at 5.
[175] Bovens, 'Analysing and Assessing' (n 19) 460.
[176] Ibid.
[177] See, Willems and van Dooren (n 122) 1016.

of common 'language' that permits easy translation of the word across different contexts and cultures. Above all though, accountability is an 'idea' or a 'concept' that is used to encapsulate the general belief that power should not be unlimited. However, the fact that this general belief has been stretched in recent times, beyond its original parameters, leaving an ambiguous and elusive concept, should not turn us away from accountability. When properly defined, the concept can be used as an effective analytical lens that may help to capture certain relationships of power better than other concepts.

This chapter has conceptualised accountability in the abstract, in order to draw a minimalist definition. The definition captures three dimensions of accountability. First, there must be an obligation upon the institution to provide information; to explain and justify decisions; and, more broadly, to comply with principles of good governance laid out in the ILA Report. Second, an independent accountability forum must have the capacity to evaluate decisions against pre-determined, objective criteria. Finally, there must be the potential (and it need only be the potential) for the actor to face consequences for the failure to adequately justify behaviour against these standards. In seeking to defend this conception of accountability, it is illustrative to note that the (admittedly few) attempts to conceptualise accountability have seemed to yield similar definitions. Also, that these definitions have developed in the literature across a variety of perspectives, for example on public administration,[178] democratisation studies[179] and international relations,[180] is a strong indication that its core meaning is not dependent on assumptions about the political context defined simply in terms of the domestic or international dichotomy.[181] This also suggests that any differences between domestic and international manifestations of accountability are not located at the highest level of conceptual abstraction. This opens the way for meaningful comparisons without an immediate danger of conceptual stretching.[182] Having established a minimalist definition, this chapter introduced the argument that in addition to the traditional understanding of accountability as an *ex post*

[178] Bovens (n 19).
[179] Schedler (n 63).
[180] Ruth Grant and Robert Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American Political Science Review* 29.
[181] Mathias Koenig-Archibugi, 'Accountability in Transnational Relations: How Distintive Is It?' (2010) 33(5) *West European Politics* 1142, 1143-1144; cf Hidemi Suganami's classic definition that the domestic analogy consists of 'presumptive reasoning … about international relations based on the assumption that since domestic and international phenomena are similar in a number of respects, a given proposition which holds true domestically, but whose validity is as yet uncertain internationally, will also hold true internationally'. Hidemi Suganami, *The Domestic Analogy and World Order Proposals* (Cambridge University Press 1989) 24.
[182] Ibid.

response mechanism (its 'fire-fighting' role), which is essentially retrospective and backwards-facing, there is unchartered potential to conceive accountability as an on-going, iterative *process* (the 'fire-watching' role), which is equally prospective, and forward-facing in nature.

III. Situating Discourses on Security Council Accountability within Debates on Global Constitutionalism: Identifying Converging Roots in the Theory of Liberal-Legalism

Introduction

The turn to Security Council accountability in international legal literature lacks sufficient theoretical foregrounding. Indeed, this is symptomatic of traditional approaches to the study of international institutional law more generally, as conceded by the authors of the two leading textbooks in the field. To Henry Schermers and Niels Blokker, 'it is true that theoretical reflection in the field of international organizations has been limited'.[1] Similarly, Jan Klabbers has described the discipline as 'immature' because it lacks 'a convincing theoretical framework'.[2]

In recent times, however, the discipline has undergone something of a turn to theory, and a turn to critique. The theoretical turn revolves, in many ways, around the so-called 'constitutionalisation' of international law generally. At the turn of the century, it would certainly have been true to say that: 'If anyone were to propose a pairing of phrases to characterize current developments in international law, the smart money would surely be on constitutionalization and fragmentation'.[3] There is no doubt that, from around about the turn of the century, up until very recently, global constitutionalism, in particular, was 'the international legal term *du jour*'.[4] Today, while global constitutionalist debates continue at pace, the initial wave of literature has itself bred subsidiary discourses relating to how to operationalise the concept in relation to international institutions.[5] In this context, it is arguable that if we were to produce a similar grouping of phrases to capture recent developments in international institutional law, two different phrases would rise to the top: 'accountability' and 'responsibility'.

[1] Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity within Diversity* (5th edn, Martinus Nijhoff 2011) 9.
[2] Jan Klabbers, *Introduction to International Institutional Law* (2nd edn, Cambridge University Press 2009) 3.
[3] Jan Klabbers, 'Constitutionalism Lite' (2004) 1 *International Organizations Law Review* 31, 31.
[4] Christine EJ Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff 2011) 1.
[5] See eg, Alec Stone-Sweet, 'The Structure of Constitutional Pluralism: Review of Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Post-National Law' (2013) 11 (2) *International Journal of Constitutional Law 491, 493:* 'We have not moved "beyond constitutionalism," rather, the age of global constitutionalism has barely begun'.

The purpose of this chapter is to situate the 'turn to accountability' within the aforementioned existential developments in international institutional law. As an analytical device, rather than an accurate description of reality as such, much of the following may be understood in terms of action and reaction, move and counter-move, and this is the methodology adopted in this chapter.[6] The first section identifies certain disciplinary anxieties that have emerged in reaction to the proliferation and increased functional autonomy of international institutions generally and the Security Council in particular. As a counter-move, a clear 'constitutional turn' is identifiable in international legal literature. The second section attempts to identify certain themes in global constitutionalist literature that relate directly to the aforementioned disciplinary anxieties. Under the first theme, 'hierarchy', compliance with certain constitutional principles is understood to provide the ultimate constitutional authority that was otherwise lacking in a decentralised international legal order. In relation to the second, 'unity', constitutionalism provides unity and coherence in an otherwise fragmented system. With regards to the third theme, 'formalisation', new legal doctrines are created, or existing doctrines amended, to counter the deformalisation problem. In turn, the 'formal' role of international courts and tribunals to enforce compliance is elevated. To be clear, this chapter does not propose to provide a holistic systemisation of the themes of global constitutionalism. Such an endeavour would be beyond the scope of this thesis and would in any event likely be in vain considering that the theory itself is such a broad, interdisciplinary church. Instead, the chapter suggests, in section three, that each theme of global constitutionalisation tends to point in the same direction. That is, they point towards a constitutionalist discourse rooted in, and driven by, the political theory of liberal-legalism. The chapter concludes on a sceptical note, cautioning that such a narrow (liberal-legal) perspective on the process of global constitutionalisation could result in an unduly narrow conception of accountability.

1. Disciplinary Anxieties

Klabbers has attempted to capture what he terms 'the transformation of international institutional law',[7] by dichotomising two theoretical approaches: 'functionalism' and 'global

[6] For a similar approach, see, Jan Klabbers, 'Setting the Scene' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press 2009) 3.
[7] Jan Klabbers, 'The Transformation of International Organizations Law' (2015) 26(1) *European Journal of International Law* 9.

constitutionalism'.[8] The theory of functionalism, at root, relates the teleological idea that states create international institutions in order to realise certain common-held values. This premise, so the theory follows, traditionally instilled in international lawyers an apparent assumption that whatever independence and influence an international institution gained at the expense of its member states was necessarily good for the effective functioning of the institution.[9] This sentiment is reflected in the many suggestions that international institutions could somehow remedy existing defects of the global legal order.[10] David Kennedy, for example, located the move to institutions in turn-of-the-century reformist aspirations that would 'convert passion into reason',[11] thus reflecting an 'optimism in the ability of international organizations to control international conflict'.[12] In 1964, Inis Claude Jr described the movement towards increased international co-operation and organisation as 'a secular trend toward the systematic development of an enterprising quest for political means of making the world safe for human habitation'.[13] In its most evocative form, the theory finds its home in the idea that international institutions can provide the 'salvation of mankind'.[14] Whilst mainstream approaches perhaps use more modest, temperate language, the recognition of the importance of international institutional autonomy in furthering the development of the international legal order has indeed been a recurrent feature in international legal scholarship over the past century or so. As Richard Collins and Nigel White suggest:

> Some of the discipline's most influential jurists, from Westlake in the 19th century, to Lauterpacht and Kelsen in mid-20th century, to Franck and Cassese at the end of the Cold War period have all, in various ways, placed their hopes in increasingly autonomous international institutions to secure the rule of law in international affairs.[15]

[8] Jan Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 3.
[9] Richard Collins and Nigel D White (ed), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011) 2.
[10] See, Jan Klabbers, 'Unity, Diversity, Accountability: The Ambivalent Concept of International Organisation' (2013) 14(1) *Melbourne Journal of International Law* 149, 153; Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity within Diversity* (5th edn, Martinus Nijhoff 2011) 6-7.
[11] David Kennedy, 'The Move to Institutions' (1986) 8 *Cardoza Law Review* 841, 859.
[12] Ibid.
[13] Inis L Claude Jr, *Swords into Plowshares: Problems and Progress of International Organisation* (3rd edn, University of London Press 1965) 405.
[14] Nagendra Singh, *Termination of Membership of International Organisations* (Stevens and Sons 1958), cited in Jan Klabbers, 'Unity, Diversity, Accountability: The Ambivalent Concept of International Organisation' (2013) 14(1) *Melbourne Journal of International Law* 149, 153.
[15] Ibid.

In other words, while mainstream approaches remained rooted in the theory of functionalism, it did not seem necessary to invoke the concept of accountability in the context of international institutions. Thus, it followed, international institutions 'could hardly be seen to engage in activities that would warrant control'.[16]

However, as a result of recent quantitative and qualitative shifts in the arena of international institutions, the functional presumption no longer seems to hold. Quantitatively, while the very notion of international institutions was a relative novelty before 1945, according to most calculations today the number of institutions in operation comfortably outnumber states.[17] There has also been a qualitative transformation. David Mitrany described international institutions, in 1948, as 'loose associations for occasional specific joint action'.[18] In the context of globalisation and more formal international co-operation in issues that were formerly under the exclusive competence of the state, however, contemporary international institutions are tasked with delivering on a much broader range of economic, social, and environmental objectives.[19] It is not just the range of activities that have increased exponentially, but also their impact. As was demonstrated in chapter I, acts of the Security Council can (and do) have negative consequences, sometimes inflicting harm on member states, sometimes on other international institutions, often on individuals. To this end, we might say that the functionalist assumption has been turned on its head. While earlier approaches might have assumed that international institutions are 'inherently good', the more recent trend is not to start from this assumption, but to look at international institutions in a more conceptual and critical way.[20]

As a result, functionalist theory appears to have lost some of its explanatory and normative value. On the one hand, we might say that this is because functionalism was never a fully-fledged 'theory' at all. Very few of the above-mentioned scholars would have self-identified as 'functionalists'. In any event, even if those writers would have agreed with the underlying

[16] Jan Klabbers, 'Controlling International Organizations: A Virtue Ethics Approach' (2011) 8 *International Organizations Law Review* 285, 285-6.
[17] Jan Klabbers, *An Introduction to International Organizations* Law (3rd edn, Cambridge University Press 2015) 1: 'estimates vary from some 240 to 350'.
[18] David Mitrany, 'The Functional Approach to World Organization' (1948) 24 *International Affairs* 350, 351.
[19] Martin Loughlin, 'What is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism?* (Oxford University Press 2010) 61; David Held and Anthony McGrew, *Governing Globalization: Power, Authority and Global Governance* (Polity Press 2002).
[20] Jan Klabbers, 'The Life and Times of the Law of International Organizations' (2001) 70 *Nordic Journal of International Law* 287, 315: 'Where for a long time the goodness of international organizations had been assumed to be inherent, nowadays organizations must "prove" that they are "worthy" entities, and in doing so they may have to compete with other actors, both for resources and for recognition of the legitimacy of their activities'.

premises, this reflects the prevailing sentiment of the time, more than a consciously adopted theoretical approach. The theoretical aspect of functionalism was, therefore, added retrospectively. However, on the other hand, it is nevertheless worth reflecting on this sentiment and using it as the point of departure, not least because it has slowly been eroded due to the emergence of certain 'disciplinary anxieties'. These anxieties are described below in terms of an 'authority problem', a 'systemic problem', a 'fragmentation problem' and a 'deformalisation' problem.

1.1. The Authority Problem

Authority can be defined, generally, as the capacity to determine others and the capacity, in doing so, to reduce the freedom of others; that is, 'to unilaterally shape their legal or factual situation'.[21] In the Weberian sense, this relates to 'the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests'.[22] As international institutions are increasingly seen to exercise autonomous powers beyond their member states, we note a disassociation between institutions and their member states. The effect of bringing into being an organisation such as the United Nations was that states had created an entity that was clearly more than the sum of its separate parts: the organisation has the ability to exercise powers that no state can exercise in isolation.[23] Where it was once undisputed, in the Westphalian tradition, that legitimate authority rested with states and states alone, authority now springs from a variety of sources and institutions.[24]

With the institutionalisation of international law, a dispersion of authority is clearly taking place: international organisations now compete with states for the scarce resource of politico-legal authority.[25] As Martin Loughlin writes: 'The real threat which globalization poses is to traditional structures through which political authority is exercised.'[26] To Nico Krisch, this

[21] Armin Von Bogdandy, Phillip Dann, and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9(11) *German Law Journal* 1375, 1381-1382.
[22] Max Weber, *Economy and Society* (vol 1, first published 1922, Guenthe Roth and Claus Wittich eds, University of California Press 2013) 53.
[23] Collins and White (n 9) 2.
[24] Klabbers, 'Setting the Scene' in Klabbers, Peters and Ulfstein (n 6) 11-19.
[25] Ibid 12.
[26] Martin Loughlin, *Swords and Scales: An Examination of the Relationship Between Law and Politics* (Hart Oxford 2000) 145.

marked 'a decoupling of political processes from the nation-state; a development that demoted the state from the centre of the political universe to one among a number of actors in a wider setting, populated also by international institutions'.[27] As a result, according to Michael Zürn:

> The national constellation, that is the convergence of resources, recognition and the realization of governance goals in one political organization – the nation-state –, seems to be in a process of transformation into a post-national constellation. The nation-state is no longer the only site of authority and the normativity that accompanies it.[28]

Neil Walker captures the sentiment underpinning this 'authority problem' when he notes the 'growing inadequacy of the holistic state model in the face of the emergence of collective action and coordination problems that simply do not coincide with the political boundaries of the state'.[29]

One recent response has been to redefine authoritative acts of international institutions as instances of 'international public authority'.[30] Nico Krisch, for example, has observed the general 'decoupling of political processes from the nation-state; a development that demoted the state from the centre of the political universe to one among a number of actors in a wider setting'.[31] However, as even the strongest proponents of the 'international public authority' school concede, defining any exercise of public authority as international requires 'considerable conceptual innovation'.[32] While the states' monopoly over legitimate coercion and sovereign power over individuals was, in the Westphalian tradition, an empirical fact, it also transcended this fact in an important way. It provided the very roots of, and the context underpinning, the development of the idea of 'public authority' itself as a conceptual phenomenon. Thus, to the extent that international institutions clearly make decisions that determine other legal subjects and curtail their freedom, this continues to jar with traditional approaches to authority, approaches that place the state at the centre of its legitimate exercise.

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[27] Krisch (n 31) 5.
[28] Michael Zürn, 'The State in the Post-National Constellation - Societal Denationalization and Multi-Level Governance' (1999) *ARENA Working Papers WP 99/35* http://www.sv.uio.no/arena/english/research/publications/arena-working-papers/1994-2000/1999/wp99_35.htm
[29] Neil Walker, 'Beyond the Holistic Constitution?' in P Dobner and M Loughlin (eds) *The Twilight of Constitutionalism?* (Oxford University Press 2010) 291, 304.
[30] Armin von Bogdandy, Rudiger Wolfrum, Jochen von Bernstorff, Phillip Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010).
[31] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010) 5.
[32] Bogdandy, Dann and Goldmann (n 21) 1381.

1.2. The Systemic Problem

Ambiguity as to the source of legitimate legal-political authority simultaneously gives rise to further anxiety relating to the doctrine of state sovereignty, and the linked principles of consent and reciprocity, traditionally understood as the foundational principles of the international legal order. Indeed, this problem is 'systemic': the nature of the international legal 'system' as a whole is potentially at stake.

First, it is important to ascertain the nature of the system that is under threat. On a certain reading, the Westphalian paradigm, which speaks to the structure of the international legal system, is essentially one of a global state of nature.[33] States remain free until and unless they expressly consent to limitations on their freedom of action, and cannot be bound by obligations they have not freely consented to.[34] In other words, treaties – and by extension international law generally – gain their binding force from being consented to by sovereign states. From this perspective, rights and obligations are essentially a bilateral matter, with treaties analogous to private law contracts.[35] Friedrich Kratochwil argues that this contractual analogy traditionally 'solved' the problem of how sovereign states were to relate to each other in international relations. It allowed for the voluntary creation of binding rights and obligations, 'while at the same time preserving to sovereigns' independence and authority'.[36]

However, the contractual analogy appears threatened when it comes to international institutions. While the legal status of international institutions was, traditionally, based on the sovereign equality of their member states, the United Nations seemed 'to embody a new-type actor on the international stage', an actor that could 'threaten the supremacy of the sovereign state'.[37] The UN Charter itself, therefore, is based on something of a sovereignty paradox. At once it recalls 'the sovereignty equality of all states',[38] while conferring to the Security Council the power to directly bind member states irrespective of consent.[39] It appears, therefore, that in

[33] Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010) 134.
[34] This point of departure has found recognition in Article 34, Vienna Convention on the Law of Treaties (1969).
[35] Wheatley (n 33) 134.
[36] Friedrich Kratochwil, 'The Limits of Contract' (1994) 5 *European Journal of International Law* 465, 465 (cited in ibid 135).
[37] Collins and White (n 9) 1.
[38] Article 2(1), United Nations Charter (1945).
[39] Article 25, United Nations Charter (1945).

ratifying the Charter, states temporarily absolve their sovereign capacity in certain situations. The Council, for example, does not continuously return to member states to reconfirm consent to act.

This 'sovereignty dilemma' is a perennial problem, and it had already been considered before the establishment of the UN. When it first came to the attention of the Permanent Court of Justice in 1923, in the *Wimbledon* case, the Court held that, rather than being incompatible with sovereignty, voluntarily entering into commitments through international institutions is actually an attribute of state sovereignty.[40] In the well-known *Lotus* decision just four years later, the same Court seemed to maintain this orthodoxy. The Court reaffirmed that 'the rules of law binding upon States … emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.'[41] One way to circumvent the 'sovereignty dilemma', therefore, following the ratio of *Wimbledon* and *Lotus,* would be to say that in creating international institutions, and delegating authority thereto, states do not so much relinquish their sovereignty as 'pool' it. Institutions thus emerge as entities in which states combine their sovereignty and relative resources in order to tackle common problems.[42] Thomas Franck refers to this idea as 'institutional autochthony'.[43] From this perspective, consent is a continuing act, that does not need to be explicitly reaffirmed, but is instead deemed to be implicit, as it is rooted in the original sovereign act of joining the organisation.

However, each of these somewhat pragmatic responses appears insufficient, insofar as they fail to adequately account for the fact that the competence of certain institutions to bind all members extends, in practical ways, to situations in which even implicit consent is lacking.[44] In fact, states often explicitly disagree with the legitimacy of a Security Council decision but are nevertheless obliged to comply. The inherent tension at play between autonomous

[40] *SS Wimbledon (UK, France, Italy and Japan v Germany)* (Judgment) [1923] PCIJ Rep Series A No 1. See, specifically, Jan Klabbers, 'Clinching the Concept of Sovereignty: Wimbledon Redux' (1998) 3 *Austrian Review of International and European Law* 345.
[41] *SS* Lotus *(France v Turkey)* (Judgment) [1927] PCIJ Rep Series A No 10.
[42] This sentiment has been attributed to Max Huber, *Die Soziologischen Grundlagen des Völkerrechts* (Rothchild 1928), see, eg, Jan Klabbers, 'The Life and Times of the Law of International Organizations' (2001) 70 *Nordic Journal of International Law* 287, 293.
[43] Thomas Franck, 'Is the UN Charter a Constitution?' Jochen A Frowein, Klaus Scharioth, Ingo Winkelmann and Rüdiger Wolfrum (eds), *Negotiating for Peace: Liber Amicorum Tono Eitel* (Springer 2003) 95, 95.
[44] For example, budgets can be adopted by a two-thirds vote and the ICJ has held them as binding on all the members, including those who voted against the substantive measures that the budget funds. See, eg, *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151.

international institutional authority and the doctrine of state sovereignty remains. In this context, Bruno Simma and Andreas Paulus suggest that the doctrine of consent:

> Seems to be gradually giving way to a more communitarian, more highly institutionalized international law, in which states 'channel' the pursuit of most of their individual interests through multilateral institutions … the system as a whole increasingly permeates state boundaries for the sake of protection of individual and group rights.[45]

In some ways, the idea of 'channelling' sovereignty in order to realise 'group rights' resonates with the idea of 'pooling' sovereignty above. However, in other ways, it does point to a subtle departure from the pragmatic approach to state sovereignty and consent. If, indeed, the doctrine of consent is 'gradually giving way' and that international institutions 'increasingly permeate state boundaries'[46], then this may have important implications. In fact, in some ways the pragmatic approach simply masks the fact that the traditional (absolute) conception of state sovereignty may no longer be truly reflective of international legal doctrine, potentially denoting a substantive shift in the nature of the 'system' itself. This is precisely the result and was perhaps even the original intention of the institutional project. Hence, Martti Koskenniemi suggests that 'from the outset, international institutions were conceived less in terms of routine administration than progressive *transformation of the international system'*.[47]

1.3. The Fragmentation Problem

The institutionalisation of international law additionally gives rise to disciplinary anxieties over the capacity of traditional international legal doctrines and principles to respond. Such anxieties are predominantly expressed through the 'post-modern' themes of 'fragmentation' and 'deformalisation' of international law.[48] The institutional architecture of the international legal order – decentralised, horizontal in structure – generally lends itself to talk of fragmentation.[49]

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[45] Bruno Simma and Andreas Paulus, 'The 'International Community': Facing the Challenge of Globalization' (1998) 9(2) *European Journal of International Law* 266, 276.
[46] Ibid.
[47] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argumentation* (first published 1989, Cambridge University Press 2006) 611 (emphasis added).
[48] See eg, Richard Collins, *The Institutional Problem in Modern International Law* (Hart 2016) 3 and 197. See, on the notion of 'postmodern anxieties' generally, Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553.
[49] See classically, C Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International* Law 401, 403, 404: 'In the absence of a world legislature with a general mandate, law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other … The possibility of a conflict arises whenever instruments which are in force for different groups of

For this reason, fragmentation is not an entirely new phenomenon. As Koskenniemi reminds us, the 'international context … was always "fragmented"'.[50] However, in the context of the establishment of specialised international institutions, each possessing their own principles and rules, giving rise to largely autonomous legal regimes, the question has since attained particular international legal significance. [51]

Anxiety about fragmentation appears to be rooted in a tension between principle and practice. In *principle,* all autonomous regimes are embedded within a larger system of general international law.[52] Having said that, while sub-regimes do not exist in isolation from general international law, it is not always clear when or how norms from one regime apply within another regime and what, if any, hierarchy would be appropriate when these regimes conflict.[53] Legal words cannot be separated from the language in which they lead their life. They operate only in the context of other legal words and of a 'professional grammar' about how they are used in relation to each other.[54] The creation of legal rules in these specialised spheres of institutional activities thus transpires, in *practice*, with little cognisance of the institutional activities of other spheres or, in many instances, of the principles and practice of general international law.[55] The international system itself, according to this take on fragmentation, is diluted into a 'more or less coherent set of "normative islands" constituted by partial,

parties deal with related questions or have repercussions upon one another in any other way'. See further, LANM Barnhoorn and Karel C Wellens (eds), *Diversity in Secondary Rules and the Unity of International Law* (Martinus Nijhoff 1995).

[50] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 9, 20-21.

[51] See particularly, International Law Commission, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission' (Finalised by Martti Koskenniemi) (13 April 2006) UN Doc A/CN.4/L.682. See generally, Martti Koskenniemi and Päivi Leino, 'Fragmentation in International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553; Matthew Craven, 'Unity, Diversity and the Fragmentation of International Law' (2003) 14 *Finnish Yearbook of International Law* 3; Mario Prost and Paul Kingsley Clark, 'Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?' (2006) 5(2) *Chinese Journal of International Law* 341.

[52] For just one manifestation of this principle, see, in the context of the European Convention of Human Rights, *Bankovic v Belgium* ECHR 2001-XII (Decision on Admissibility) 333, 351, para 57: 'the principles underlying the Convention cannot be interpreted and applied in a vacuum … The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part.'

[53] See, Jeffrey L Dunoff and Joel P Trachtman, 'A Functional Approach to International Constitutionalization' in Jeffrey L Dunoff and Joel P Trachtman (eds) *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009) 331.

[54] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 9, 20-21.

[55] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission' (Finalised by Martti Koskenniemi) (13 April 2006) UN Doc A/CN.4/L.682, para 8.

autonomous and perhaps even "self-contained" legal sub-systems'.[56] In this context, Richard Collins identifies a 'growing tension between the functioning of international law in practice, dispersed between increasingly complex sites of institutional and regulatory authority, and its continuing existence, in more formal terms, as a system of decentralised, non-hierarchical legal relations'.[57] This tension appears to relate to the apparent disunity of the international system. Indeed, Andreas Paulus worries that 'the diverse and divergent institutions fail to come together under a single scheme; rather, the systemic character of international law seems threatened by a multiplicity of international regimes without obvious coherence'.[58] In search of unity in this diversity, various structuring proposals compete, leaving us with the sensation of a 'disorder of orders'.[59]As Martti Koskenniemi concludes, 'the result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law'.[60] The position of international law vis-à-vis international institutions is, therefore, key. Additional anxiety emerges as to the capacity of (formal) international legal rules to respond to the powers exercised by international institutions.

1.4. The Deformalisation Problem

International legal rules are traditionally delineated by virtue of the formal source from which they emanate. By virtue of Article 38(1) of the Statute of the International Court of Justice, identification of such formal criteria has been a task entrusted to the formal doctrine of sources. However, the institutional turn in many ways marks a 'move away from formal law-ascertainment and the resort to non-formal indicators to ascertainment legal rule'.[61] This 'deformalisation' is thus an attitude whereby rules of international law are not identified by virtue of formal criteria.[62] The Security Council's competence is a case in point. Where the

[56] Prost and Clark (n 51) 342. See generally, Bruno Simma 'Self-contained Regimes' (1985) 16 *Netherlands Yearbook of International Law* 112.
[57] Collins (n 48) 15-16.
[58] Andreas Paulus, 'The International Legal System as a Constitution' in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 69, 70.
[59] Nico Krisch, 'Global Administrative Law and the Constitutional Ambition' citing Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 373.
[60] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission' (Finalised by Martti Koskenniemi) (13 April 2006) UN Doc A/CN.4/L.682, para 15.
[61] Jean d'Aspremont, 'The Politics of Deformalization in International Law' (2011) 3 *Goettingen Journal of International Law* 503, 507.
[62] Ibid.

Council purports to 'legislate' as it did in its post-9/11 counter-terrorism resolutions, this the law-making capacity seems difficult to square with sources theory.[63] As Christine Chinkin suggests, 'the complexity of international legal affairs has outpaced traditional methods of law-making, necessitating management through international organizations, specialized agencies, programmes and private bodies that do not fit the paradigm of Article 38(1)'.[64]

Seen in its best light, one might reflect on a move towards 'deformalised equity in international law'.[65] However, on another reading, these terms may actually be mutually incompatible. It is arguable that deformalisation, in the sense of a legal of form legal rules to regulate international institutional activity, has been privileged over the principles of 'equity'. The decentralised institutional architecture of international law appears to leave it structurally indeterminate – its rules seemingly more malleable, more open to an alternative interpretation, and, overall, 'more difficult to disentangle from underlying political forces'.[66] In a more negative light, therefore, we might say that deformalisation serves as no more than 'a technique of functional (or 'dynamic') adaptation to override the dead weight of some (obsolete) form in order to realize the law-applier's view of what is substantively right'.[67] This has been seen specifically in the context of the Security Council. In accordance with the principle of *kompetenz-kompetenz*, the Security Council remains competent to determine subjectively the scope of its own jurisdiction. The 'deformalisation' anxiety, therefore, speaks directly to the nebulous position of international law in this context.

2. The Constitutionalisation of International Institutional Law: A Thematic Account

Martin Loughlin suggests that it is on the claim that an institution 'possesses its own autonomous power of innovation – the power unilaterally to extend its own competence and

[63] Collins (n 48) 227.
[64] Christine Chinkin, 'Normative Development in the International Legal System' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2003) 42. See generally, José Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2005).
[65] Martti Koskenniemi, ''The Lady Doth protest Too Much' Kosovo, and the Turn to Ethics in International Law' (2002) 65 *Modern Law Review* 159.
[66] Collins (n 48) 3.
[67] Martti Koskenniemi, ''By Their Acts You Shall Know Them ...' (And Not by Their Legal Theories)' (2004) 5(4) *European Journal of International Law* 839, 843. In a similar way, elsewhere Koskenniemi has described 'deformalisation' as the *de facto* deference to imperial power. See, Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 9, 21.

capacity – that the critical question of constitutionalisation revolves'.[68] In the context of the rise in the functional autonomy of institutions, we note a clear shift from a private, transactional (state-centred) view towards a more 'public' or even 'constitutional' understanding of international law.[69]

This shift flows from the tradition of *ius publicum*, which aims at establishing a legal framework for any exercise of public power, irrespective of its source.[70] To the extent that the turn to institutions relates to the nature, form and scope of (international) public authority and its exercise, the disciplinary boundary between public international law and international public law (or international constitutional law) is increasingly blurred.[71] Klabbers perhaps puts it most succinctly, suggesting simply that 'the law of, or about, international organizations is essentially constitutional law'.[72] Klabbers suggests, that, in a very basic sense, the theory of constitutionalism promises to 'resolve the perennial existential insecurity of international lawyers once and for all'.[73] Upon closer reflection on the three key themes that have emerged in constitutionalist discourse relating to international institutions, it becomes clear that resort to the language of constitutionalism can be viewed as a direct counter-move to the disciplinary anxieties outlined in section one.

2.1. Hierarchy

In a formal understanding of the term, a constitution is a document (or unwritten collection of norms and procedures) from which all other authority is derived. It is the centre of the hierarchical system in which the lower rules derive their authority from higher ones to the point

[68] Loughlin, 'What is Constitutionalisation?' (n 19) 66.
[69] Collins (n 48) 196. See, for indicative examples of this broader move, Bruno Simma, 'From Bilateralism to Community Interest in International Law (1994) 250 *Recueil des Cours* 221 and Christian Tomuschat, 'International Law: Ensuring the Survival of a Mankind on the Eve of a New Century' (1999) 281 *Recueil des Cours* 13.
[70] Von Bogdandy A, 'General Principles of International Public Authority: Sketching a Research Field' (2008) 9(11) *German Law Journal* 1909, 1914.
[71] See, eg, Laurence R Helfer, 'Constitutional Analogies in the International Legal System' (2003) 37 *Loyola of Los Angeles Law Review* 194; Jack Goldsmith and Daryl Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122(7) *Harvard Law Review* 1791.
[72] Although Klabbers attributes the observation to Thomas M Franck, 'D W Bowett's The Law of International Institutions' (1963-4) 77 *Harvard Law Review* 1565, 1565. See, Jan Klabbers, 'The Paradox of International Institutional Law' (2008) 5 *International Organizations Law Review* 151, 161.
[73] Klabbers, 'Constitutionalism Lite' (n 3) 48.

where the constitution itself rests on an ultimate 'rule of recognition'[74] or *Grundnorm*[75] that can only be derived from extra-legal sources of legitimacy. This presumes an element of vertical hierarchy: the constitution stands above ordinary law.

However, unlike domestic constitutional systems, the international system is traditionally understood to be a decentralised legal order. Rather than operating in a vertical, hierarchical way, it operates horizontally with the author of the law (states) also its subjects, protected by their sovereign equality. The position of individual states in this context is often described as 'role splitting' (or *dédoublement fonctionnel*).[76] As we have seen, the increase in international institutional autonomy has further exasperated the somewhat tenuous position of the traditional doctrine of sovereignty. It has also given rise to an 'authority' problem: the complex relationship between international organisations has resulted in ambiguity as to the source of ultimate authority in international law. Seeking to counteract this problem, the first theme of global constitutionalism is 'hierarchy'. Drawing on his earlier reflections on fragmentation and constitutionalism, in 2009 Klabbers wrote that 'fragmentation, verticalization, and constitutionalization form the holy trinity of international legal debate in the early 21st century'.[77] The addition of 'verticalization' into the trinity is the embodiment of a (uniquely international and uniquely legal) counter-move to the authority problem. Where the decentralised institutional architecture of international law appeared to leave it structurally indeterminate, this is in part countered by the formal rationality of (international) constitutional law and principles. That is, as autonomous institutional regimes are kept in check by general international law, the previously horizontal relationship between international law's primary subjects, states, is in part verticalised. In the words of Klabbers, 'the international legal order is becoming a world public order, or a world constitutional order: a vertical rather than a horizontal legal order, held together by a number of core universal values'.[78] It thus transpires that the idea of hierarchy manifests itself in two main ways.

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[74] HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994) 213.
[75] Hans Kelsen, *Introduction to the Problems of Legal Theory* (first published 1934, Bonnie Litschewski Paulson and Stanley L Paulson trans, Clarendon Press 1997) 196.
[76] The principle is traditionally attributed to Georges Scelle. See, Antonio Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (dédoublement fonctionnel) in International Law' (1990) 1 *European Journal of International Law* 210.
[77] Klabbers, 'Setting the Scene' in Klabbers, Peters and Ulfstein (n 6) 1.
[78] Jan Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism' in Jan Klabbers and Asa Wallendahl (eds), *Research Handbook on the Law of International Organizations'* (Edward Elgar 2011) 1, 13-14.

First, global constitutionalisation, in various degrees, relates to the elevation of certain elements of the international legal system that provide for a hierarchy, or supremacy, of legal rules. Lauterpacht had earlier referred to the formal primacy of the League of Nations covenant.[79] It is also common to identify such a hierarchy, or supremacy, in relation to the United Nations Charter. On one reading, taken together the Charter and the secondary rules on lawmaking contained in the Statute of the International Court of Justice constitute a foundational ordering of international law as a whole and are hierarchically superior to general international law. The Charter provides such 'supremacy' in the event of conflicts in Article 103, which provides that 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.[80] This is compounded by the Vienna Convention on the Law of Treaties. Article 30(1) of the Vienna Convention dictates that its provisions are also subject to Article 103 of the Charter. In the absence of this provision, Article 30(2), which states: 'When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail' would hold significant weight, in that it would ordinarily imply that subsequent treaties concerning the same subject matter would supersede and in a sense, repeal, specific sections of the Charter. The fact that this is impossible supports the hierarchy argument, as does the fact that member states agree to follow Security Council decisions taken under Chapter VII.[81] Further, Article 2(6) provides that the organisation 'shall ensure' that non-members act in accordance with the Charter principles. Constitutional authority in the Weberian sense would also require centralisation of the legitimation of the use of force, which of course the Charter provides.[82]

This chimes with Klabbers' understanding of constitutionalism itself, as he suggests: 'While there is no exact definition of constitutionalism – and such precision would probably be impossible at any rate – many would agree that at its core, it has to do with placing limits on the activities of international organizations, subjecting those organizations to standards of

[79] See, Hersch Lauterpacht, 'The Covenant as the Higher Law' (1936) 17 *British Yearbook of International Law* 55.
[80] Article 30(1), Vienna Convention on the Law of Treaties (1969); see also, Article 30(6), Vienna Convention on Treaties with and between International Organizations (1986): 'The preceding paragraphs are without prejudice to the fact that, in the event of a conflict between obligations under the Charter of the United Nations and obligations under a treaty, the obligations under the Charter shall prevail'.
[81] Article 25 (UN Charter 1945).
[82] Paulus (n 58) 77.

proper behaviour'.[83] Considering the supremacy arguably enjoyed by the UN Charter, it should be no surprise that this 'constitutional' treaty has been at the centre of calls to limit the power of the Council through law. According to this reading, international law, through the Charter, becomes the ultimate arbiter of the 'proper behaviour' of international organisations. Hierarchically superior international (constitutional) law, enforced by international courts and tribunals, provide this check on power.

Second, as constitutional norms and principles are ordinarily understood to be hierarchically superior to ordinary law, global constitutionalisation relates to the elevation of certain principles or values that are elevated to the particular class of 'constitutional'. That is, in addition to reimagining the international legal system as a vertical structure, a second iteration of the hierarchy theme lies in the supremacy of certain norms within that system.[84] Antonio Cassese makes an analogy with domestic constitutional law, in that 'the hierarchy of *sources* entails a hierarchy of *rules*: a law may not derogate from or be inconsistent with a constitutional provision … these peremptory norms have a rank and status superior to those of all other rules of the international community'.[85] In this model, the constitutional character of particular norms is not derived from their source (positivism) but merely the legitimacy of their substance or overall character. According to Anne Peters, 'it remains possible to distinguish according to the substance of the norms in question. Only those norms which have 'something fundamental' to them may be duly qualified as constitutional norms'.[86] What is at stake is no less than a fundamental re-ordering of the traditional principles of international law. Bryde, for example, defines the constitutionalised system of international law as 'not horizontal but verticalised. It recognises a source of legitimacy that is higher than the individual states, a hierarchy of norms in which ordinary legal rules have to be reviewed against constitutional principles'.

2.2. Unity

The second theme of the constitutionalisation on international institutional law is unity. As we have seen, amongst defenders of constitutionalist approaches it is debated which category

[83] Klabbers, 'Constitutionalism Lite' (n 3) 32.
[84] See eg, Erika de Wet, 'The Emerging International Constitutional Order: The Implications of Hierarchy in International Law for the Coherence and Legitimacy of International Decision-Making' (2007) 10 *Potchefstroom Electronic Law Journal* 2, 20.
[85] See, eg, Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 198-9.
[86] Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579, 599.

should be at the apex of the system (general international law or constitutional principles). Despite this, all approaches aim at forging the coherence and unity of the international legal system, perhaps offering a counter-weight to the fragmentation anxiety.[87]

First, unity provides for the integration of the international legal system as a whole. Global constitutionalist discourse has challenged the traditional view that the international sphere is 'a sort of constitutional wasteland or empty quarter'.[88] This theme relates, first, to the unity and autonomy of the legal system as a whole. David Kennedy suggests that global constitutionalism offers the international legal lawyer some 'recognizable map, some form of cognitive control over global political life'.[89] He suggests that in much the same way as domestic systems are held together by the constitution, so too the various branches of international law are increasingly seen as having some form of constitutional law hovering over them. That is, a general body of rules is vital for indicating how the various branches hang together.[90] This resonates with Oscar Schachter's famous metaphor that general international law provides the 'highways between the otherwise isolated villages'.[91] As Paulus suggests, 'In the same vein in which a constitution unifies the domestic polity in one legal superstructure, a developed, institutional reading of international law would unify the international community in a single coherent constitutional structure'.[92] It is in this way that this theme of constitutionalism responds directly to the fragmentation challenge.

Second, the theme of unity also relates to the subjects of international law. The 'public' in the original, nation-state-centred version of constitutionalism is the state. Its citizens exercise collective self-determination. Beyond the state, it is traditionally assumed that there is no defined community which would constitute the subject of collective self-determination and

[87] For a general exploration into the various possible meanings of the concept of unity in international law, see Mario Prost, *The Concept of Unity in Public International Law* (Hart 2012). Jan Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 3, 14, makes reference to 'constitutional, and therewith unifying' values.
[88] Philip Allott, 'Intergovernmental Societies and the Idea of Constitutionalism' in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations* (United Nations University Press 2001) 92.
[89] David Kennedy 'The Mystery of Global Governance', in Jeffrey L Dunoff and Joel P Trachman (eds.) Constitutionalism, International Law and Global Governance (2009) 37.
[90] Klabbers, 'Setting the Scene' in Klabbers, Peters and Ulfstein (n 6) 11.
[91] Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1991) 1. This suggests that for Schachter, general international law played a proto-constitutional role.
[92] Paulus (n 58) 69.

legitimise international public authority.[93] Nevertheless, as international organisations, as well as individuals, have increasingly become actors and subjects of international law, the perception of the 'constituents' within the system has shifted: we note an apparent shift from a community of states to a so-called 'international community'.[94] Hersch Lauterpacht was amongst the first to suggest that the unity of the international legal system in its benefit to the international community as a whole.[95]

Again, this idea is often voiced by reference to the United Nations Charter. In international law, the notion of a constitution distinguishes treaties establishing an institution from other international agreements.[96] Wolfgang Friedmann had already invoked this sense when referring to 'international constitutional law' as the area of a comparative study of 'constitutions' of intergovernmental organisations.[97] The United Nations Charter is in this sense synonymous with what Article 5 of the Vienna Convention calls a 'constitutive document'.[98] While the Charter is an international treaty (not a world government), this suggests it has a normative character as a result of which it has to a certain extent evolved beyond a mere treaty.[99] Bardo Fassbender considers the drafting of the Charter as a truly 'constitutional moment' in the history of international law, as the outcome of a 'legal revolution' in Kelsenian terms.[100] Simma offers 'the basic norms of the Charter as the constitutional law of the universal international community, and the Charter organs, at least in practical terms, as organs of the international community of States as a whole'.[101] Fassbender, however, goes much further. He suggests that the Charter represents not just the constitution of the international community of states, but the international community in its entirety. Fassbender is the main proponent for viewing the United Nations Charter as *the* constitution

[93] Matthias Goldmann, 'A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and Not Law) (2016) 5(1) *Global Constitutionalism* 48, 64.
[94] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3, para 33; Preamble to the Rome Statute of the International Criminal Court (12 September 2003) and Article 42(b) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (28 January 2002).
[95] Hersch Lauterpacht, *The Function of Law in the International Community* (first published 1933, Oxford University Press 2011) 123.
[96] Erika De Wet, *Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) 93.
[97] Wolfgang Friedmann, *The Changing Structure of International Law* (Stevens 1964) 153.
[98] Article 5, Vienna Convention on the Law of Treaties (1969): 'The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization'
[99] De Wet (n 96) 94.
[100] Andreas L Paulus, 'Book Review: Fassbender, Bardo. UN Security Council Reform and the Right of Veto: A Constitutional Perspective', 10 *European Journal of International Law* (1999) 209, 209.
[101] Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) *Recueil des Cours* 221, 262.

of the international community, as one visible document to be understood as 'an authoritative statement of the fundamental rights and responsibilities of the members of the international community and the values to which this community is committed - a document that is also the basis of the most important community institutions.[102]

However, like a domestic constitution, although the Charter is the major point of reference for the rights and obligations of the international community, it does not contain all normative elements that make up the constitutional order. For example, the fundamental law of the international legal order is supplemented by *jus cogens*; that is, the peremptory norms of general international law which are accepted by the international community of states as a whole from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character.[103] This is, of course, irrespective of treaty ratification. In some cases, a principle may have developed to a peremptory norm due to its inclusion in the Charter, such as the prohibition of the threat or use of force.[104] In other cases, a norm affirmed by the Charter may already have existed as a peremptory norm before its enunciation in the Charter, for example, the *inherent* right to self-defence. Thus, the Charter summarises and reiterates in one fundamental text the basic principles that already served as the cornerstone of international relations, while adding new ones to reinforce and enhance the former.[105] Of course, it may appear problematic that a rule of customary international law can become peremptory without being explicitly enunciated in the Charter. However, as Tomuschat notes, in domestic law the content of the constitutional order is not necessarily limited to the written document.[106] A constitution can grow contingently, moulded by the manifold political and historical forces at work. In the process, unwritten norms appear which are inter-linked with those already codified. These norms can be derived from the logical

[102] Bardo Fassbender, 'Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 133, 137.
[103] See, Article 53 of the Vienna Convention. See also, de Wet (n 96) 95; see, further, Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529, 573.
[104] Commentary of the Commission to Article 50 of its Draft Articles on the Law of Treaties, at 247: 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*'. In *Nicaragua*, the International Court noted that the prohibition of the use of force is 'frequently referred to in statements by state representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 190.
[105] De Wet (n 96) 95-6.
[106] Christian Tomuschat, 'Obligations Arising for States Without or Against their Will' (1993) 241 *Recueil des Cours* 195, 217-18.

implications of the generic rules established in the Charter, 'which provide the ethical and legal matrix of peremptory norms'.[107] In this sense, values pose limits to classical international law because they have been enshrined in hierarchically superior norms, which, theoretically, states cannot deviate from by agreement.[108]

Seen in the best light, the constitutional turn might suggest that the international community shares a universal set of values that can bring order to the disorder and uncertainty associated with fragmentation. In legal doctrine, Verdross' value-orientation finds two expressions, *jus cogens* and general principles of international law. Also, in the present debate, many scholars refer to global values in order to explain the special status and universally binding character of fundamental norms, *jus cogens* and obligations *erga omnes*[109] or fundamental human rights.[110] As regards *jus cogens*, we can regard Verdross as a pacesetter at his time. In his introduction to the sources of international law, Verdross considered *jus cogens* a part of necessary constitutional law (*notwendiges Verfassungsrecht*).[111] To de Wet, there is now adequate evidence for 'common values manifested through an emerging hierarchy of norms and structures for the enforcement of these values in the international sphere'.[112] De Wet accepts that the roots of these universal values undoubtedly derive in Western legal and political thought, but suggests that they 'can no longer be said to be confined to those cultures'.[113] This is reflected, *inter alia*, 'by the universal recognition of fundamental human rights as well as the increasingly widespread recognition of the importance of democracy in non-western cultures'.[114] The crucial point though, according to this line of argument, is that this universality is provided not by international law, *per se*, but over-arching constitutional principles.

2.3. Legalisation

[107] De Wet (n 96) 96.
[108] Krisch, *Beyond Constitutionalism* (n 31) 32.
[109] Ulf Linderfalk 'International Legal Hierarchy Revisited – The Status of Obligations Erga Omnes' (2011) 80 *Nordic Journal of International Law* 1, 1.
[110] See, generally, Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012).
[111] Thomas Kleinlein, 'Alfred Verdross as a Founding Father of International Constitutionalism' (2012) 4 *Goettingen Journal of International Law* 385, 400.
[112] See Erika de Wet, 'The International Constitutional Order' (2006) 55 *International and Comparative Law Quarterly* 51-76.
[113] De Wet (n 96) 93.
[114] Ibid; on the specific issue of the importance of democracy, see, Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86(1) *American Journal of International Law* 46.

As a direct response to the deformalisation problem, the recent turn to 'accountability' and 'responsibility' in international institutional law can be seen, first and foremost, as a move to hold international institutions to their obligations under general international law – to define the boundaries of international institutions' legal responsibilities. This preference has led commentators to point to the progressive legalisation of the international sphere.[115] This reflects the final theme of the constitutionalisation of international institutional law. Anne Peters suggests that the process of constitutionalisation so far has been 'lopsided', in that it has displayed a normative preference for 'adjudicative rather than deliberative' measures.[116] She also notes that 'many phenomena which are discussed by international lawyers under the heading of constitutionalisation may simply be called thicker legalization and institutionalization'.[117]

At this stage in the development of global constitutionalism, it seems that it is 'difficult to imagine today a sphere of social activity that would not be subject to some type of international legal regulation'.[118] Accountability, in turn, thus takes a specifically legalistic character. This is not the space to survey how this legalised version of institutional accountability plays out in practice;[119] instead, the focus here is on the rationale underpinning this theme: the institutionalisation of an international rule of law.

Hayek has provided one of the clearest and most powerful formulations of the ideal of the rule of law: 'stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.'[120] While the respect for the rule of law traditionally has been a requirement addressed to the domestic legal order, the relevance of the principle is increasingly acknowledged also as part of international law.[121] The idea has clearly

[115] See generally, Judith L Goldstein, Miles Kahler, Robert O Keohane and Anne-Marie Slaughter, *Legalization and World Politics* (MIT Press 2001).
[116] Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16(2) *Indiana Journal of Global Legal* 397, 408.
[117] Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579, 597.
[118] International Law Commission, 'Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.702, para 4.
[119] See chapter 4, sections 2 and 3.
[120] Friedrich A Hayek, *The Road to Serfdom* (first published 1944, University of Chicago 2007) 54.
[121] The idea has been recognised in several treaties and international legal instruments, especially at the European level, such as the preamble of the European Convention on Human Rights (ECHR) referring to the 'common

transcended the domestic sphere in the context of global governance. As the late Thomas Bingham suggested: 'If the daunting challenges now facing the world are to be overcome, it must be an important part through the medium of rules, internationally agreed, internationally implemented and, if necessary, internationally enforced. That is what the rule of law requires in the international order'.[122] There may be different opinions about the most appropriate elements of the rule of law as applied in international law.[123] But the idea has traditionally been seen to include that no one and no organ is beyond the law, i.e. that the use of power shall be governed by law; the absence of arbitrary power; equality before the law; and protection of rights by independent courts.[124]

The legalisation of international law responds to the anxiety, reflected by Collins, that 'international law's institutionalisation has failed to secure the rule of law in terms of greater accountability'.[125] In short, global constitutionalism is said to provide a bulwark against institutionalisation and deformalisation as it is intimately bound up in the rule of law.[126] The rule of law relates to 'the regulation of a community based on law and justice, not on power'.[127] And, according to Klabbers, 'constitutionalism … would encompass the exercise of authority in accordance with some version of the rule of law'.[128] That is, it aims to create a system in

heritage of political traditions, ideals, freedoms and the rule of law'. See, further, United Nations General Assembly, 'World Summit Outcome Document (2005) A/RES/60/1, para 134, recognising 'the need for universal adherence to and implementation of the rule of law at both the national and international levels'. This commitment has been followed up in subsequent General Assembly resolutions. See, eg, UNGA Res 62/70, 'The Rule of Law at the National and International Levels' (7 December 2007) UN Doc A/RES/62/70, para 4: '*Reaffirming further* the need for universal adherence to and implementation of the rule of law at both the national and international levels and its solemn commitment to an international order based on the rule of law and international law, which, together with the principles of justice, is essential for peaceful coexistence and cooperation among States'.

[122] Thomas Bingham, *The Rule of Law* (Penguin 2010) 129.

[123] Umit Özsu, 'Against Legal Fetishism (Part One)' (2 November 2017) *Legal Form* <https://legalform.blog/2017/11/02/against-legal-fetishism-umut-ozsu-part-one/>: 'The "rule of law" belongs to that time-honoured class of canonical juridical concepts whose ubiquity stems to no small degree from its imprecision'.

[124] Geir Ulfstein, 'Institutions and Competences' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press 2009) 45, 60.

[125] Collins (n 48) 226; Anthony F Lang Jr, 'Constitutionalism and the Law: Evaluating the Security Council', in by Vesselin Popovski and Trudy Fraser (eds), *The Security Council as Global Legislator* (Routledge 2014) 11, 13: 'Constitutionalism is a political theory that protects individuals from arbitrary exercise of power through the rule of law and a separation of powers'.

[126] See generally, Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 127-137; Sir Arthur Watts 'The International Rule of Law' (1993) 36 *German Yearbook of International Law* 15; James Crawford 'International Law and the Rule of Law' (2003) 24 *Adelaide Law Review* 3; Simon Chesterman '"I'll Take Manhattan": The International Rule of Law and the United Nations Security Council' (2009) 1 *Hague Journal on the Rule of Law* 1; Jeremy M Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge University Press 2007); André Nollkaemper, 'The Internationalized Rule of Law' (2009) 1 *Hague Journal on the Rule of Law* 74.

[127] Ulfstein (n 124) 59.

[128] Klabbers, 'Constitutionalism Lite' (n 3) 33.

which 'politics, passions and power are tamed by the particular rationality of the legal system'.[129]

While this value-oriented perspective of global constitutionalisation is offered primarily as a descriptive account and responds to the perceived emergence of community interests in positive international law, the recourse to values also has a normative dimension and at least potentially supports rules enforcing these values. In summary, this final theme of global constitutionalism connotes the legalisation, juridification and the judicialisation of international institutionalisation law. The (international) rule of law is traditionally used as the vehicle to realise this legalisation. Additionally, more often than not its advocates tend to characterise the court as the agent through which the universal values of the (international) rule of law are given expression.

3. Global Constitutionalisation and Liberal-Legalism

3.1. Between Description and Normativity

Ambiguity as to the relationship between explanation and normativity is a recurring theme in global constitutionalism literature. Herman Belz had already argued, half a century ago, that 'the use of the term "constitutional" in a descriptive way … will have a normative connotation'.[130] The problem of normativity is not, however, in and of itself problematic. What does deserve attention though is the practice of masking an essentially normative argument with a façade of neutrality. There is something of a conceptual disingenuousness at play when arguments are presented in evenhanded terms, as if they were, in fact, drafted behind the 'veil of ignorance'.[131] The last two syllables of the concept itself should alert us to an additional meaning.[132] Like any 'ism', the invocation of constitutional*ism* carries a particular set of theoretical claims, an ideology even. It denotes a belief in or a practice of a certain social,

[129] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010) 27.
[130] Herman Belz, 'Changing Conceptions of Constitutionalism in the Era of World War II and the Cold War' (1972) 59 *Journal of American History* 640, 669.
[131] Kennedy, 'The Mystery of Global Governance' (n 89) 63, and 60: 'those who work in the constitutionalist vernacular are often dressing up normative projects in sociological terms'. On the 'veil of ignorance' generally, see, of course, John Rawls, *A Theory of Justice* (Harvard University Press 1971).
[132] Jeremy Waldron, Constitutionalism: A Skeptical View' in Thomas Christiano and John Christman, *Contemporary Debates in Political Philosophy* (John Wiley and Sons 2009) 265, 267-268.

political, cultural economic or legal system.[133] In the words of Oliver Diggelmann and Tilmann Altwicker, constitutionalism as a 'concept cannot be understood appropriately if it is regarded as a purely 'analytical' or 'descriptive' tool. It has a subtext which deserves our attention'.[134] The final section of this chapter offers one potential reading of the 'subtext' underpinning the global constitutionalist themes that have emerged as a counter-move to international institutional law's disciplinary anxieties. It attempts the show that just as similar themes emerge in constitutionalism both within and beyond the state, so too, both are based on similar theoretical and philosophical underpinnings. These overlapping assumptions and rationales resonate with the political theory of liberalism-legalism.

The elevation of liberal-legalism in this context illustrates that just as it is impossible to divorce the recent turn to international institutional accountability from the discourse on global constitutionalism, so too, it is impossible to divorce constitutionalisation on the global level from domestic manifestations. The critical point is that although the idea of public authority has, in many ways, transcended the state and has become internationalised, the themes of constitutionalism beyond the state – hierarchy, unity and legalisation – which ostensibly emerge as a counter-move to suit the new (specifically international) context, in many ways, mirror the trajectory of constitutionalism within states.

The first question to address is *why* liberal-legalism has emerged as the central leitmotif driving the apparent constitutionalisation of international institutional law. The answer, in part, might relate the fact that proponents enter into these debates carrying baggage from their own national constitutional traditions'.[135] The transfer of liberal principles into global constitutionalist discourse is, therefore, to a certain degree operates on the level of the subconscious. In mainstream approaches, this baggage is typically informed by liberal approaches to

[133] See, Schwöbel (n 4) 2; Nicholas Tsagourias, 'Constitutionalism: A Theoretical Roadmap' in 'Constitutionalism: A Theoretical Roadmap' in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (Cambridge University Press 2007) 1.

[134] Oliver Diggelmann and Tilmann Altwicker, 'Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism' (2008) 68 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht* 623, 631.

[135] Kennedy, 'The Mystery of Global Governance' (n 89) 61. Wouter Werner, 'The Never-ending Closure: Constitutionalism and International Law' in Nicholas Tsagourias (ed) *Transnational Constitutionalism: International and European Perspectives* (Cambridge University Press 2007) 330, who suggests that international legal literature on constitutionalism is, for the most part, 'an attempt to explain existing developments in international law in terms borrowed from domestic constitutionalism'.

constitutionalism.[136] It is no coincidence then that the loudest proponents of global constitutionalism yield from liberal-democratic legal systems.

3.2. The Liberal Component

Richard Bellamy suggests that modern constitutionalism generally is based on a concept of liberalism.[137] Two aspects of classical liberalism are most obviously at play in the current debate. The first is the principle of liberal individualism; that is, the liberal notion of the propriety of individual rights. In the liberal tradition, priority is assigned to the individual, rather than to the polity as a whole. As a corollary, the exercise of governmental authority is seemingly justified, or legitimised, by the need to protect individual interests. Put another way, individual self-determination replaces the value of collective self-determination.

The second is the central insight of liberalism that political power arbitrarily exercised is destructive not only of individual liberty but also of the rule of law.[138] John Gray has written of the project of contemporary liberalism being, if not actually to abolish politics, at least so to constrain it 'by legal and constitutional formulae that it no longer matters what are the outcomes of political deliberation'.[139] Indeed, 'law lies at the base of this system.'[140] Importantly, however, the converse of this is also true: the rule of law is 'a first principle of liberalism'.[141] Its status as 'first principle' can, indeed, be traced at least to the French Declaration of the Rights of Man and Citizen (1789). Where, in Article 16, it is asserted that 'a society in which the guarantee of rights is not assured and the separation of powers not established has no constitution', it identified two prerequisites as defining elements of a constitution which could

[136] Richard Collins, 'Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law's Past' (2009) 22 *Leiden Journal of International Law* 251, 285.
[137] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007); Michael W Dowdle and Michael A Wilkinson, *Constitutionalism beyond Liberalism* (Cambridge University Press 2017) 1: 'The structural-liberal vision of constitutionalism has grown to dominate constitutionalism in comparative … terms'.
[138] Paul Starr, *Freedom's Power: The True Force of Liberalism* (Basic Books 2007) 15-6.
[139] John Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (Routledge 1996) 76. A frequent objection holds that the construct 'liberal-legalism' groups together all liberals as if they are a homogenous group. An objection along these lines misses the point of constituting the class 'liberal-legalism', and claims far too much for it. 'Liberal-legalism' is not synonymous with 'liberalism', and does not claim to be. The fact that liberalism contains within it a number of different variants does not of itself undermine the coherence of 'liberal-legalism' as an idea. Indeed, 'liberal-legalism' is a construct that is attacked by some liberals, particularly by liberal pluralists such as Isaiah Berlin. See generally, Scott Veitch, *Moral Conflict and Legal Reasoning* (Hart 1999) ch 1.
[140] Ibid.
[141] Paul Starr, *Freedom's Power: The True Force of Liberalism* (Basic Books 2007) 21.

easily be understood as explicitly power-limiting devices.[142] Those same prerequisites, fundamental rights protection and the separation of powers, are clearly at play in the recent turn to global constitutionalism. It is possible, therefore, to trace this turn to theories of classical liberalism. In the words of Paul Star, 'just as liberalism has historically sought to protect individual rights through the rule of law and limits on unbridled power at home, so it has sought to project those same norms of respect for law, life, and liberty into the international arena'.[143]

3.3. The Legal Component

It is, in turn, possible to map these insights on classical liberalism with the theory of legalism. The modern form of legalism is most often attributed to the work of Judith Shklar. At its root, the theory of legalism relates to 'the ethical attitude that holds moral conduct to be a matter of rule following and moral relationships to consist of duties and rights determined by rules'. Shklar also ascribes to the theory a material dimension, in that it would seem to imply that 'the court of law and the trial according to law are the social paradigms, the perfection, the very epitome of legalistic morality'.[144]

Brought together, the aim of liberal-legalism is to secure 'the enclosure of politics within the straitjacket of law'.[145] It simultaneously highlights the law's 'ideal qualities' while presenting politics in a wholly negative light.[146] This mainstream approach to constitutionalism is, thus, defined by the relentless pursuit of the restraint of governmental authority through forms of public regulation.[147] In this light, Adam Tomkins refers to four themes of 'liberal-normativism' which, to him, reflect the general theory of liberal-legal constitutionalism. With some reconstruction to relate to the context of international institutions, these themes can be summarised as follows.[148] First, international law is autonomous to and superior over politics.

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[142] Ulrich K Preuss 'Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept? in Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism?* (Oxford University Press 2010) 23.
[143] Paul Starr, *Freedom's Power: The True Force of Liberalism* (Basic Books 2007) 17.
[144] Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press 1986) 1-2.
[145] Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oxford: Hart, 2000) 5.
[146] Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oxford: Hart, 2000) 12.
[147] Ibid.
[148] See generally, Adam Tomkins, *Our Republican Constitution* (Hart 2005); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 3. On the themes in this specific form, see, Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 *Oxford Journal of Legal Studies* 157, 158-9.

Second, the exercise of all international public authority should be kept in check by international law. Third, the most legitimate way of controlling the exercise of international public authority is through the judicial articulation and enforcement of broad principles of legality. Forth, the goal of this project is to safeguard a particular vision of international human rights.

Against this metric, the relationship between global constitutionalism and liberal-legalism becomes clear. The following definition of global constitutionalism deserves repetition in full as it is particularly illustrating. Klabbers described global constitutionalism as:

> the exercise of authority in accordance with some version of the rule of law, be it limits internal to the organization (emanating from its own documents) or external to the organization (subjecting it to general international law and human rights standards). And in this scheme, an important role is reserved for judicial review: in the final analysis, judges will be deemed to be the guardians of the rule of law and of the constitution, for they are, many would agree, above politics. Constitutionalism typically aims to tame man's quest for power, and aims to do so by providing legal limits. It stands to reason, then, that individuals trained in the law are deemed most suitable to this task.[149]

This definition, I submit, is broadly indicative of the disciplinary turn to global constitutionalism in international institutional law. And such an understanding strikingly corresponds to each element of liberal-legal constitutionalism according to Tomkins' framing highlighted above. Where liberal-legal constitutionalism assumes that law is superior to politics, so too global constitutionalism 'tames man's quest for power …by providing legal limits'.[150] Where the former claims that all public authority should be kept in check by law, the latter endorses 'the exercise of authority in accordance with some version of the rule of law.'[151] Where the former endorses a preference for the judicial process over the democratic, to the latter 'judges will be deemed to be the guardians of the rule of law'.[152] Likewise, global constitutionalism proposes subjecting (international) public authority to human rights standards, as per Tomkins' fourth theme.

[149] Klabbers, 'Constitutionalism Lite' (n 3) 33.
[150] Ibid.
[151] Ibid.
[152] Ibid.

As highlighted above, when constitutional principles are translated from the domestic to the international plane 'typically the liberal, power-limiting ones … travel better than others'.[153] However, 'they hardly ever arrive unchanged'.[154] The final challenge, therefore, is to identify exactly what has to 'change' in order for international institutional law to accommodate liberal-legal constitutionalism; or, in other words, what is lost when these changes are attempted. To the present author, there are four principle challenges.

The first challenge is that global liberal-legal constitutionalism appears to suggest something of a faux universality of 'global values'. This is apparent in two ways. One the one hand, under the theme of hierarchy, for example, it is arguable that global constitutionalism elevates certain universal values, or principles, to the level of 'constitutional', to the point where there is seemingly no longer any room for disagreement as to the merits of these principles. On the other hand, under the theme of 'unity', it is arguable that global constitutionalism assumes the existence of a homogeneous international community united in a belief in both the universality of these principles and their position in positive international law. The very idea of international law as a 'Constitution of Mankind' is based on the apparent absorption of *a priori* constitutional values in international law.[155]

However, the claim to found any political system on impartial rules that guide and circumscribe everyday political contestation has been criticised as concealing the contested nature of fundamental issues.[156] The effect of the myth of homogeneity that liberal-legal constitutionalism provides is that 'it postpones, rather than encourages, concrete debates on concrete problems'.[157] David Kennedy refers to this phenomenon as a form of 'settlement bias'; that is, 'recasting our situation in constitutional terms can give us the feeling things are settled. The struggle is over and this is how it turned out'.[158] In the same way, Klabbers suggests that 'the constitutionalism debate has a great capacity for overshadowing more overtly political

[153] Nico Krisch, 'Pouvoir Constituant and Pouvoir Irritant in the Postnational Order' (2016) 14(3) *International Journal of Constitutional Law* 1, 16.
[154] Ibid.
[155] Christian Tomuschat, 'International Law as the Constitution of Mankind', in United Nations (ed), *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (United Nations 1997) 37.
[156] Nico Krisch, 'Global Administrative Law and the Constitutional Ambition' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (Oxford University Press 2010) 254; see further, James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press 1995).
[157] Peters, merit, 403, who cites the composition of the Security Council as precisely such a debate.
[158] Kennedy, 'The Mystery of Global Governance' (n 89) 64.

debates, with the possible result that an unpopular status quo remains in place'.[159] In other words, it tells us that the *political* struggle is over: in accordance with the rule of law, the law has literally ruled. Again, this resonates with a certain aspect of classical liberalism, which, on one reading, is based on the assumption that 'constitutions are a-political (or pre-political), carved in stone, containing transcendental values valid beyond the here and now'.[160] Kennedy continues that: 'constitutionalizing our existing governance structures does aim to remove them from contestation and revision, to harden their division of power, and to freeze their political and legal players'.[161] However, this is inherently problematic in the context of the pluralistic structure of international society.[162] In fact, to a certain extent, it threatens to deny pluralism altogether. As Krisch argues, 'in a setting as inegalitarian as that of global politics, efforts at providing a stable framework of rules and institutions – at constituting international society – are bound to sanction structures that primarily benefit the powerful'.[163] This challenge is particularly damning in the context of the Security Council, of course, where the permanent membership already enjoys significant privileges.

The second challenge is that liberal-legal constitutionalism presents the rationality of international law as if this idea was not inherently contested. Implicit within liberal-legal constitutionalism is the treatment of legal rules and values as forming a set of rational moral principles.[164] Legal rationality is portrayed as not merely different from political rationality, but as self-evidently superior to it. Thomas Poole, for example, speaks of a sanguine, dispassionate quality to law, and specifically to the practice of judicial review. He grounds legal constitutionalism in 'a basic opposition of 'passions' to 'reason': the structuring and tempering, that is, of the dynamic and creative impulses of politics with the inherent reasonableness of settled law'.[165] In accordance with this theory, law purports to deal with rules

[159] Klabbers, 'Constitutionalism Lite' (n 3) 50.
[160] Klabbers, 'Setting the Scene' in Klabbers, Peters and Ulfstein (n 6) 9; see further, Michael Barnett and Martha Finnemore, 'The Power of Liberal International Organizations' in Michael Barnett and Raymond Duvall (eds) *Power in Global Governance* (Cambridge University Press 2005) 163-71, describing the prevailing liberalism dominating scholarly thinking about international organisations.
[161] Kennedy, 'The Mystery of Global Governance' (n 89) 63.
[162] See, Nico Krisch, 'Global Administrative Law and the Constitutional Ambition' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (Oxford University Press 2010) 254: 'The more diverse and contested the political order is, the less attractive seems the idea of freezing the political order in a seemingly neutral consensus, and the more appealing recourse to either punctual, contractual settlements between groups or to institutional provisions that keep fundamental issues open to continuing contestation and revision.'
[163] Nico Krisch, 'Global Administrative Law and the Constitutional Ambition' Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism* (Oxford University Press 2010) 255.
[164] Loughlin, 'What is Constitutionalisation?' (n 19) 67.
[165] Thomas Poole, 'Judicial Review at the Margins: Law, Power, and Prerogative' (2010) 60(1) *University of Toronto Law Journal* 81, 81.

which are neutral, whose validity derives from some combination of their place in a larger system and their adherence to higher moral principle, and so ostensibly independent of the identity of those who invoke them.[166] In the words of Loughlin: 'The establishment of a framework of fundamental law conveys the belief that answers to all political disputes can ultimately be found in law'.[167] This is the essence of liberal-legalism.

At the international level, this resonates with what Koskenniemi describes as 'a familiar hubris… the assumption that a right ("lawful", "valid", "optimal", "effective") solution already exists somewhere, and the lawyer's task is just to find it and apply it'.[168] Jean D'Aspremont has taken issue with this 'mechanical jurisprudence', which he describes as both an 'abuse of deduction' and an 'abuse of logic'. [169] The whole canon of realist international legal theory has surely, at this point, exposed this reasoning as 'an illusion and thwarted the idea that formal immanent rationality actually exists'.[170] It is under this influence that international lawyers, although not denying its bearing upon legitimacy and authority of judicial decisions, 'have lost faith in the mathematic formal predictability in the behaviour of law-applying authorities'.[171]

The third challenge to liberal-legal constitutionalism and its presentation of the rationality of international law is that it is unlikely to be effective if its aim is to limit the power of international institutions. As Klabbers describes, 'rules-based approaches' to the tension between autonomy and accountability will always have certain inherent weaknesses: they 'can be interpreted *mala fide*, they can be circumvented because they will always and inevitably leave loopholes and they tend to push acceptable behaviour to the limit'.[172] Again, this is apparent in the context of the Security Council. The practice of the Council suggests that it does see instead to be bound to comply with the wording of Article 39 in order to trigger its enforcement competence. However, as was gleaned in chapter 1, the circumstances which can

[166] Paul Scott, '(Political) Constitutions and (Political) Constitutionalism' (2013) 14 *German Law Journal* 2157, 2162.
[167] Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oxford: Hart, 2000) 194; Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 *Oxford Journal of Legal Studies* 157, 172.
[168] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 9, 22.
[169] See eg, Jean D'Aspremont, 'The Politics of Deformalisation in International Law' (2011) 3 *Göttingen Journal of International Law* 503, 509-10.
[170] Ibid.
[171] Ibid 510.
[172] Jan Klabbers, 'Autonomy, Constitutionalism and Virtue in International Institutional Law' in Richard Collins and Nigel D White (eds), *International Organizations and the Idea of Autonomy* (Routledge 2011).

be said constitute a 'threat to the peace' under this provision have been stretched to breaking point.

The final challenge to the idea of legal rationality is that it seems to misstate the problem at hand. The framework within which international institutions operate seemingly has more to do with what Jeremy Waldron terms 'the circumstances of politics', than what might correspondingly be called 'the circumstances of law'. To Waldron, 'the circumstances of politics' relates to the 'felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be.[173] International institutions are vested with specific functional competence. The Security Council, for example, exists solely by virtue of its 'primary responsibility for the maintenance of international peace and security'.[174] When faced with a 'threat to the peace, breach of the peace, or act of aggression',[175] triggering its competence under Chapter VII, permanent members of the Council often legitimately disagree about the most appropriate course of action. In any event, the ultimate decision that is reached is the product of political deliberation, as opposed to any sense of legal obligation.

Ultimately, if the invocation of constitutional language into the theory of international institutions is to yield analytical value, it must move beyond attempts to devise some ideal construct of law, whether as a model of rules or a model of rights, and then seeking to reinterpret the reinterpret the complex relationships between international institutions, their member states, and other actors, in accordance with its precepts. As we have seen, in the context of the Security Council especially, it is important that we keep these competing rationalities open to investigation and accommodation.[176] Ultimately, Loughlin's most important conclusion is that liberal-legalism, if understood as an absolute theory with no room for supplementary, or alternative approaches, is doomed to fail. In his words:

> The project of establishing law as an objective framework of rational principles … has not been successful. With the ascendancy of law as right we do not therefore reach the end of history, or an escape from politics. Instead, this legalization of politics has led primarily to a politicization of law.[177]

[173] Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) 102 (emphasis in original).
[174] Article 24, United Nations Charter (1945).
[175] Article 39, United Nations Charter (1945).
[176] Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2003) 28.
[177] Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart 2000) 232-3.

Conclusion

This chapter has sought to show that each theme of constitutionalisation, as it has emerged in the literature on international institutions, offers a normative counter-balance to the disciplinary anxieties of international lawyers identified in section one of this chapter. Hierarchy purports to solve the authority problem, fragmentation breeds unity, and deeper legalisation responds to deformalisation. However, further disciplinary anxieties emerge in the face of the increased autonomy of international organisations, and the ambiguous position of the foundational doctrine of state sovereignty and linked ideas of consent and reciprocity. The trajectory of the current debate offers little to counter this 'systemic' problem, in fact, it exacerbates it. This can be shown more clearly with reference to four ironies, which have so far remained unaddressed in the literature.

First, resort to the language of global constitutionalism might appear to be built on an irony, in that the loudest proponents of a 'constitutionalised' international legal regime tend to voice such proposals in the particular context of international organisations; that is, the very organisations whose proliferation gave rise to the sovereignty problem in the first place.[178] Second, while general international law and constitutional principles are presumed to step in to provide constitutional authority, the (systemic) sovereignty problem remains at large. This gives rise to a second irony: the struggle for global constitutionalism appears, in some ways, to be a struggle to re-establish sovereignty, but on an international level. Yet, somewhat paradoxically, the very rationale behind the turn to institutions was itself to overcome the limits of sovereignty and move towards international co-operation beyond the state. Global constitutionalism thus aims 'somehow to reinvent at an international level the sovereign authority it was determined to transcend'.[179] It does so, primary, with reference to the idea of the international rule of law.

There are at least two objections to be made against the transposition of ideas of the rule of law in this context. First, the rule of law is traditionally deemed to be of less relevance at the international level since obligations will generally not be imposed on states without their

[178] Klabbers in Klabbers, Peters and Ulfstein (n 6) 3.
[179] Klabbers, 'Constitutionalism Lite' (n 3) 46; David Kennedy, 'The International Style in Postwar Law and Policy' (1994) 1 *Utah Law Review* 7, 14.

consent. As the decision-making powers of international institutions increase, both formally and in practice, the need for control of such powers is deemed to increase also. However, assuming that general international law is the sole means through which to realise this, this would seem to accept that by virtue of the 'verticalisation' of international law, the standing of state sovereignty, traditionally perceived as the essential organising principle of international law, has been diluted. Second, the rule of law at the domestic level is primarily assumed to protect individuals, whereas states are the principal legal subjects at the international level. Granted, states have a need for the predictability that the rule of law promises to provide, and a minority of states or weaker states may need protection from abuse by an international organisation dominated by stronger states. Also, to the extent that international organizations exercise powers in relation to states, their decisions will ultimately affect individuals, not least if the use of military force is authorized or sanctions are adopted. International decisions are, moreover, increasingly targeting individuals directly, such as smart sanctions and counter-terrorist measures.[180] Nevertheless, it again presumes a position for general international law that is above the state. So, again, while the rule of law might provide a solution of sorts to the deformalisation problem, it does not respond at all to the more systemic sovereignty problem.

In fact, in order to re-imagine international institutional law as being regulated by some (apparently apolitical) constitutional neutrality and rationality, international lawyers have tended 'to advocate reading into international law necessary functional distinctions, normative hierarchies and procedural principles, which jar uneasily with its non-hierarchical institutional form'.[181] The decentralised, horizontal, inherently non-unitary, structurally indeterminate legal system is flipped on its head, essentially as a precept for processes of global constitutionalisation. However, its proponents fail to acknowledge that there is nothing neutral or (objectively) rational about this move. Such a comprehensive restructuring is seemingly based on its advocates (subjective) philosophical preference for liberal-legal constitutionalism. It is ultimately likely to breed a new wave of systemic anxieties for international lawyers.

As was discussed in chapter I, there was a common perception of a convergence of political ideas within the permanent membership of the Security Council in the immediate post-cold-war period. These ideas did, indeed, centre on the idea of common values held by the

[180] Ulfstein (n 124) 60, 77-80.
[181] Collins (n 48) 242-3.

international community of states. The identification of universal values is a central theme of constitutionalisation. There is a third irony, however, found in the fact that the themes of global constitutionalism largely emerged at the same time as, and in the context of, the Security Council's period of revitalisation in the 1990s and then, with more than a hint of selective memory, less than a decade later these same themes were being used in an attempt to control the Security Council.

The final irony relates to the relationship between the process of constitutionalisation and the concept of accountability itself. As accountability discourse emerged as a way to operationalise the apparently newly 'constitutionalised' international institutional space, it is arguable that the linkages between the two phenomena are so close that the form that Security Council accountability takes, in fact, the very meaning of accountability in this context, is inherently predicated on the meaning that we ascribe to broader processes of constitutionalism and constitutionalisation. However, if, as I have argued, the trajectory of global constitutionalism directly mirrors that of liberal-legal constitutionalism in domestic and comparative settings,[182] then this actually leaves surprising little room for accountability as a conceptual device. The remaining space for accountability is both limiting, in that its place is solely to constrain the Security Council from passing resolutions which may flirt with the boundaries of its constitutional competence,[183] and limited, in that it fails to speak to the broader legitimacy deficit whereby the Council fails to address problems of international peace and security (albeit in the absence of a formal legal obligation to do so). Thus, while it was determined in chapter II that the concept of accountability may be sufficiently flexible and malleable so as to accommodate the various aspects of the Security Council's legality and legitimacy deficits, the narrow perspective on global constitutionalisation, predicated on liberal-legal ideology, would seem to restrict the capacity of the concept to actually service this purpose.

The final part of this thesis shifts the outlook from theory to application. It asks first how the concept of accountability might relate to Security Council practice through this liberal-legal lens. The applicability of the doctrine of international legal responsibility is considered in this

[182] Loughlin, 'What is Constitutionalisation?' (n 19) 69: 'International constitutionalisation actually follows the same trajectory as the domestic level: it is part of a general restructuring movement, founded on particular conceptions of liberty and equality, and promoted through a rights and responsiveness agenda'.
[183] The links between 'accountability as limitation' and liberal-legal constitutionalism can be seen in Collins reflection on the 'liberal idea of auto-limitation'. See, Collins, 'Constitutionalism as Liberal-Juridical Consciousness' (n 136) 264.

context, before returning to the three dimensions of accountability: transparency, standards, and consequences. Each dimension is addressed through the lens of liberal-legal constitutionalism. Finally, these same dimensions are approached through the lens of an alternative perspective, that of political constitutionalism, in an attempt to transcend the limitations imposed by liberal-legalism.

Part III. Application

IV. Accountability and the Doctrine of International Legal Responsibility: A Sceptical View

Introduction

In order to justify the emphasis placed on the concept of accountability in this thesis, the extent to which it overlaps with, and yet is distinct from, the doctrine of international legal responsibility needs further explanation and clarification. Chapter one identified the almost unrivalled legal power conferred to the Security Council while acting under Chapter VII of the Charter. As a preliminary observation, we can point to notions of power and authority as a common denominator linking accountability and responsibility. Clyde Eagleton famously claimed that 'power breeds responsibility'.[1] As early as 1929, Dionisio Anzilotti expressed the view that 'the existence of an international legal order postulates that the subjects on which duties are imposed should equally *be responsible* in the case of a failure to perform those duties'.[2] The notion that power must be exercised 'responsibly', or be held to 'account' has been described as a fundamental principle of the rule of law.[3] Whether we agree that either concept has yet reached such heights, common sense and instinct would seemingly dictate that any entity exercising power has the corollary duty to somehow account for, or take responsibility for, that exercise to another entity meant to control, or condition, such exercise.[4] The question of whether there is a substantive line of demarcation between accountability and responsibility has not, however, received adequate attention.

The following is split into four sections. The first contextualises the intuitive drive towards understanding accountability as a tenet of international responsibility. The second discusses the doctrine of international responsibility in historical context, noting that a shift has occurred in recent times from an assumption that the doctrine applies exclusively to states, to the incorporation of international organisations into its field of reach. In this context, the Articles on the Responsibility of International Organizations (ARIO), adopted by the International Law

[1] Clyde Eagleton, *The Responsibility of States in International Law* (New York University Press 1928) 206.
[2] Dionisio Anzilotti, *Cours de Droit International* (trans Gilbert Gidel, vol 1, Recueil Sirey 1929) 467 (emphasis added).
[3] See eg, Vera Gowland-Debbas, 'The Security Council and Issues of Responsibility' (2011) 105 *Proceedings of the Annual Meeting (American Society of International Law)* 348, 348.
[4] See further, Antonios Tzanakopoulos, 'Strengthening Security Council Accountability for Sanctions: The Role of International Responsibility' (2014) 19(3) *Journal of Conflict and Security Law* 409.

Commission in 2011, is used as the point of departure.[5] In section three, a number of general criticisms are identified in relation to this development. It is submitted in particular that the International Law Commission's decision to use the principles of state responsibility as the foundation for the rules of responsibility applicable to international organisations was flawed, failing as it did to take into account the principle of 'speciality' in relation to international organisations, and the lack of relevant practice in this regard. Drawing on this general critique, the chapter finally raises a number of observations in regard to the (in)applicability of international responsibility to Security Council conduct under Chapter VII of the Charter, specifically in relation to the principle of attribution of conduct.

1. The Intuitive Drive towards Responsibility

At first glance, there appears little room for manoeuvre between the 'twin' concepts; in fact, accountability and responsibility are routinely treated as synonymous.[6] Such practice is widespread. The Oxford English Dictionary, no less, cites responsibility as a synonym in its entry for accountability.[7] Synonymisation takes place on at least two different levels. On the one hand, synonymising can be quite casual. Where Ku and Jacobson, for example, state that 'there is no accountability within the United Nations and establishing responsibility in the way that it is established in democracies [has] proved impossible',[8] we can assume that nothing is specifically implied by shifting from accountability to responsibility. In fact, often, and probably in the case above, the decision is simply stylistic, with the two terms interchanged to avoid unnecessary repetition of one or the other. On a conceptual level, this can be understood. However, in international law, international responsibility is such a well-established *legal doctrine*, that using the terms interchangeably can be more problematic. As international lawyers, we have, in a way, become socialised to associate international responsibility in its

[5] International Law Commission, 'Draft Articles on the Responsibility of International Organizations, with Commentaries', in Report on the Work of Its Sixty-third Session (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10.

[6] See eg, Hirohide Takikawa, 'Conceptual Analysis of Accountability: The Structure of Accountability in the Process of Responsibility' in Sumihiro Kuyama and Michael Fowler (eds), *Envisioning Reform: Enhancing United Nations Accountability in the 21st Century* (United Nations University Press 2009) 73, 75. Significantly, Higgins has used the term 'accountability' to describe international responsibility as 'accountability for violations of international law'. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1994) 187.

[7] Angus Stevenson (eds), *Oxford Dictionary of English* (3rd edn, Oxford University Press 2010) 11.

[8] Charlotte Ku and Harold K Jacobson, 'Conclusion' in Charlotte Ku and Harold K Jacobson (eds), in *Democratic Accountability and the Use of Force in International Law* (Cambridge University Press 2003) 372.

international legal context. Therefore, to associate accountability with the doctrine of international legal responsibility is to deny the concept of any wider value.

International legal scholars have also more consciously and explicitly used the terms as broadly synonymous, thus adopting a narrow understanding of accountability. Many commentators proceed on the basis that as there seems to be no definite and invariable usage of the two terms, 'it would not be fruitful … to elaborate and articulate definitions of accountability and responsibility to discern a few slight differences between them'.[9] It has been suggested that accountability does, indeed, mean no more and no less than holding the Security Council to account of its international legal obligations, through the doctrine of international responsibility. It is submitted that this is much more problematic, for two reasons. On the one hand, it completely overplays the role that international responsibility can actually play in this context, considering the ambiguity over substantive legal limits on Security Council decision-making, and the lack of compulsory jurisdiction of any judicial institutional to enforce the Security Council's legal responsibility should it be triggered. On the other hand, and equally importantly, it underplays two aspects of accountability. First, it underplays the role that retrospective accountability can, in fact, have as a non-legal concept (or quasi-legal concept at most). Second, it underplays the more prospective dimensions of accountability that responsibility, as an implicitly retrospective doctrine, simply cannot accommodate.

Gerhard Hafner argues that accountability 'seems to reflect primarily the need to attribute certain activities under international law to such actors as a precondition for imposing on them responsibility under international law'.[10] He adds, 'although this understanding is undoubtedly too narrow, one can quite safely conclude that accountability reaches into the field of international responsibility for wrongful acts, including that of international organizations'.[11] Mulgan's analysis may be illuminative as it points to a potential half-way position between accountability and responsibility, particularly as it may also serve as a potential compromise between internal and external demands for accountability. To Mulgan, accountability denotes the external functions of scrutiny – such as calling to account, requiring justifications and imposing consequences – the core senses of accountability. As such, to Mulgan, 'while

[9] Takiwawa (n 37) 75.
[10] Gerhard Hafner, 'Accountability of International Organizations' (2003) 97 *Proceedings of Annual Meeting of the American Society of International Law* 236.
[11] Ibid.

accountability was once seen as the external aspect of the broader concept of responsibility, responsibility is now taken as the internal aspect of the broader concept of accountability'.[12] There is also a normative dimension. Antonios Tzanakopoulos, for example, argues 'that 'legal accountability', i.e. the rules of international responsibility, is the most objective and effective process for holding the Council to account'.[13] The rationale underpinning this is that responsibility, pace accountability, puts 'a harder edge on legal rights and duties'.[14]

When it comes to identifying legal limits on the Security Council, it makes some sense to adopt the framework of international responsibility, as it is a much more established principle within international legal discourse than its 'twin' accountability. As Alvarez has suggested, 'the notion of "responsibility" has a grip on the legal imagination that the vague and suspiciously political term, "accountability", does not'.[15] Some commentators have grouped accountability within 'intrinsically non-legal concepts'.[16] If we were to follow this line of reasoning, it is perhaps intuitive to view 'responsibility' as the legal component of the broader (political or quasi-legal) concept of 'accountability'. That is, that the concept of international responsibility denotes a particular form of legal accountability, focused upon the legal consequences of breaches of international law that are attributable to an international actor.[17] This Chapter puts the doctrine of international responsibility under the spotlight, and critically appraises the applicability of the doctrine to Security Council conduct. To be clear, to avoid any conceptual ambiguity therefore, this chapter employs the term as defined by the International Law Commission. The rationale is that this is the meaning that has been traditionally ascribed in the literature.[18]

2. General Principles of International Responsibility

[12] Mulgan, '"Accountability": an Ever-Expanding Concept?' (n 44) 558.
[13] Tzanakopoulos (n 4) 411.
[14] Ian Brownlie, *System of the Law of Nations: State Responsibility, Part I* (Oxford University Press 1983) 87.
[15] José Alvarez, 'International Organizations: Accountability or Responsibility?' (27 October 2006) *Address at the Canadian Council of International Law* <http://www.temple.edu/law/ils/CCILspeech.pdf>
[16] Deirdre Curtin and André Nollkaemper, 'Conceptualizing Accountability in International and European Law', (2005) 36 *Netherlands Yearbook of International Law* 4) 4.
[17] Jutta Brunnée, 'International Legal Accountability through the Lens of the Law of State Responsibility (2005) 36 *Netherlands Yearbook of International Law* 21, 22.
[18] There is great scope, however, to conduct a broader conceptual inquiry as to the various *other* forms that responsibility might take in relation to Security Council practice. This is, however, deemed beyond the scope of this thesis.

It is, initially, important to distinguish between primary and secondary rules of international law applicable to the United Nations. Primary rules, in this context, refer to customary and treaty rules that create substantive rights and obligations binding on the United Nations.[19] Primary rules are not commonly considered to be part of the law of responsibility.[20] Instead, the doctrine of international responsibility addresses secondary rules of international law. That is the 'general conditions under international law for the State [or international organisation such as the United Nations] to be considered responsible for wrongful actions or omissions, and the legal consequences that flow therefrom'.[21]

The systematic study of the law of responsibility began in the 1950s and the almost fifty-year process culminated in the publication of the International Law Commission's widely respected Articles on Responsibility of States for Internationally Wrongful Acts,[22] which the General Assembly took note of and commended to the attention of United Nations member states in 2002.[23] As the principal subjects of international law, states, not international organisations, have traditionally been perceived as the only entities capable of incurring responsibility. Indeed, state responsibility remains the 'paradigm form of responsibility on the international plane'.[24]

The ARIO define an international organisation as 'an organization established by treaty or other instrument governed by international law and possessing its own international legal personality'.[25] Established by the United Nations Charter, the United Nations is in many ways the archetypal international organisation.[26] The Security Council can be characterised not as

[19] Antonio Cassese, *International Law* (2nd edn, Oxford University Press, 2005) 244.
[20] James Crawford, 'The International Law Commission's Articles on Responsibility of States for International Wrongful Acts: A Retrospect' (2002) 96(4) *American Journal of International Law* 874, 879-9; Brunnée (n 17) 23.
[21] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries', in Report on the Work of Its Fifty-third Session (23 April 1 June and 2 July - 10 August 2001) UN Doc A/56/10 ('State Responsibility Articles) at para 1; ARIO (commentary) (n 4) at para 67.
[22] Ibid.
[23] UNGA Res 56/83 (28 January 2002) United Nations Doc A/RES/56/83.
[24] James Crawford and Simon Olleson, 'The Nature and Forms of International Responsibility', in Malcom D Evans (ed), *International Law* (Oxford University Press 2003) 446. A comprehensive discussion of the law of state responsibility, further than identifying functional analogies with the law of responsibility of international organisations, is beyond the scope of this thesis. See instead, James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013).
[25] Article 2(1) ARIO.
[26] See, eg, Noemi Gal-Or and Cedric Ryngaert, 'From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO) – The Responsibility of the WTO and the United Nations' (2012) 13 *German Law Journal* 511, 513, who describe the United Nations as 'the pre-eminent [international organisation]'.

an international organisation *per se*, but as a constituent organ (a principle organ no less) of the organisation, the United Nations.[27] The relevant law applicable to the United Nations, the law governing the responsibility of international organisations, has developed at a much slower pace in comparison to state responsibility. However, with the diversification of the subjects of international law the monopoly of states vis-à-vis the law of responsibility has been weakened to a certain extent.[28] In this context, Lozanorios suggests that the international legal community is moving to '"responsibilize" international organisations, especially the United Nations through the [Security Council]'.[29] The emerging calls for decisions of the Security Council under Chapter VII of the Charter to be brought under the law of responsibility can, therefore, be understood within this milieu.[30]

In 1996, it is noteworthy that in a report on peacekeeping operations the United Nations Secretary-General had already referred to the principle of state responsibility. He described the principles as '*widely accepted* to be applicable to international organizations' and suggested that 'damage caused in breach of an international obligation and which is attributable to the State (or to the Organization) entails the international responsibility of the State (or of the Organization).[31] In 2002, the International Law Commission decided to include the subject of the responsibility of international organisations in its program of work.[32] The Articles on the Responsibility of International Organizations attempt to fill the deliberate gap left in 2001 by the State Responsibility Articles,[33] and aim to establish a general framework for the responsibility of international organisations. The Articles, in the same mould as the State Responsibility Articles, 'apply to the international responsibility of an international organization for an internationally wrongful act'.[34] Taking inspiration from the State

[27] Article 7(1), United Nations Charter (1945).
[28] See, Alain Pellet, 'The Definition of Responsibility in International Law', in James Crawford, Alain Pellet, Simon Olleson and Kate Parlett (eds), *The Law of International Responsibility* (Oxford University Press 2010) 3, 6.
[29] Frédérique Lozanorios, 'Responsibility of the United Nations for Wrongful Acts Occurred in the Framework of Authorised Operations in Light of the Draft Articles on the Responsibility of International Organizations (DARIO)' (2014) 18 *Max Planck Yearbook of United Nations Law* 109, 110.
[30] See eg, Vera Gowland-Debbas, 'The Security Council and Issues of Responsibility' (2011) 105 *Proceedings of the Annual Meeting (American Society of International Law)* 348.
[31] 'Report of the Secretary-General' (20 September 1996) United Nations Doc A/51/389, para 6 (own emphasis added).
[32] International Law Commission, 'Report on the Work of its Fifty-Fourth Session', United Nations GA Res 57/21 (21 January 2003) United Nations Doc A/RES/57/21, at para 2.
[33] Article 57 of the State Responsibility Articles provides: 'These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization'.
[34] Article 1 ARIO.

Responsibility Articles, the general principles are outlined in Article 4. The provision states that there is an internationally wrongful act of an international organisation when conduct consisting of an action or omission, is, first, attributable to that organisation under international law; and, second, constitutes a breach of an international obligation of that organisation.

On the one hand – and especially considering the fact that the ARIO do not purport to introduce any new restrictive primary obligations upon international organisations, and merely relate to the consequences that flow from the violation of an existing obligation – the move to expand the law of responsibility to international organisations is perhaps logical.[35] It is generally accepted that, like states, international organisations can incur responsibility. So much was affirmed in the 1949 *Reparations* Advisory Opinion, when the International Court of Justice determined that the United Nations 'is a subject of international law and capable of possessing international rights and duties and that it has the capacity to maintain its right by bringing international claims'.[36] In other words, legally, the United Nations is more than the sum of its (state) parts. The Organisation possesses an objective legal personality, separate from that of its members. If the United Nations is subject to international obligations, as a corollary we may say that the organisation is legally responsible for violations thereof.[37] If it was not, in a decentralised system United Nations member states would be responsible in its place, and this outcome would seem to contradict the separate legal personality of the United Nations. The alternative – that nobody would be responsible – 'is widely considered to be intolerable'.[38]

[35] Although, see, Andre Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359, 408-412, who suggest that some responsibility rules may reflect primary rules under this classification; see also, Kristen Boon, 'Regime Conflicts and the United Nations Security Council: Applying the Law of Responsibility' (2010) 101 *George Washington Journal of International Law* 787, 830; cf Dominic McGoldrick, 'State Responsibility and the International Covenant on Civil and Political Rights' in Malgosia Fitzmaurice and Dan Sarooshi (eds) *Issues of State Responsibility Before International Judicial Institutions* (1st edn, Hart 2004) 165-6, who argues that responsibility rules are being misused by the human rights regime as primary instead of secondary rules.

[36] *Reparations Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, at 179. The Court has also recognised that *ultra vires* acts can be attributed to an international organisation, and affirming that all members of an organisation may have to contribute to the unforeseen expenses of that international organisation. *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ 151, at paras 167-168.

[37] See specifically, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, at para 66. See further, Pellet (n 28) 6-7; Alvarez 'International Organizations: Accountability or Responsibility?' (n 15) 3, Ralph Wilde, 'Enhancing Accountability at the International Level: The Tension Between International Organization and Member State Responsibility and the Underlying Issues at Stake' (2006) 12(2) *ILSA Journal of International and Comparative Law* 395, 401.

[38] See eg, Kristina Daugirdas, 'Reputation and the Responsibility of International Organizations' (2015) 25(4) *European Journal of International Law* 991, 995 and subsequent footnotes.

3. Criticisms of the Articles on the Responsibility of International Organizations

For a number of reasons, it is safe to conclude that the International Law Commission's recent effort to develop principles of responsibility for international organisations has not been as well-received as its state-focussed counterpart. The most salient criticisms of the ARIO can be summarised as falling under three broad categories: (1) the ill-conceived practice of directly transposing the principles of state responsibility to international organisations (the copy and paste approach); (2) the failure to acknowledge the principle of 'speciality' in relation to international organisations; and (3) the scarcity of practice whereby the responsibility of an international organisation has been incurred for a breach of an international obligation.

3.1. The Copy and Paste Approach

To formulate the ARIO, the International Law Commission applied and adapted many of the principles of state responsibility. Ultimately, almost two-thirds of the Articles directly track their counterparts in the State Responsibility Articles.[39] This has been referred to as the 'copy and paste approach'.[40] On the one hand, the International Law Commission has argued that 'it would be unreasonable … to take a different approach on issues relating to international organizations that are parallel to those concerning States, unless there are specific reasons for doing so'.[41] Indeed, the International Law Commission had followed a similar practice previously, drawing on the 1969 Vienna Convention on the Law of Treaties between States for the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[42] The International Law Commission has also been keen to reiterate that this should not necessarily state a presumption that all issues are to be regarded as similar and should lead to analogous solutions.[43] However, on the other

[39] Articles 3-5, 9, 11-16, 19-21, 23-24, 26-31, 33-39, 41-47, 54-57, 60 and 65-67 ARIO.
[40] See, Christiane Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the "Copy-Paste" Approach' (2013) 9 *International Organizations Law Review* 53, 54. Alvarez describes the same as a '"find and replace" exercise … replacing "international organization" wherever the word "state" originally appeared'. Alvarez, 'International Organizations: Accountability or Responsibility?' (n 15) 2.
[41] International Law Commission, Special Rapporteur Giorgio Gaja, 'First Report on Responsibility of International Organizations' (26 March 2003) United Nations Doc A/CN.4/532, at para 11.
[42] See, Christiane Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the "Copy-Paste" Approach' (2013) 9 *International Organizations Law Review* 53, 54.
[43] See, International Law Commission, Special Rapporteur Giorgio Gaja 'First Report on Responsibility of International Organizations' (26 March 2003) United Nations Doc A/CN.4/532 7, at para 11.

hand, it has been argued that the International Law Commission has failed to justify the substantive similarities between the ARIO and the State Responsibility Articles.[44] The Republic of Korea, in submitting general comments to the International Law Commission on the ARIO, suggested that '[G]iven the differences between States and international organizations, a separate set of draft articles is required rather than the wholesale application of the articles on State responsibility'.[45] In this regard, the individual comments submitted by Portugal to the International Law Commission may be particularly illustrative of the general sentiment:

> [T]he draft articles continue to follow too closely those of State responsibility, in a way that may cause the work of the Commission to deviate from what should be its main objective: to deal with the specific problems that the issue of the responsibility of international organizations entails. The ongoing exercise can even give rise to incoherent solutions. Thus, we find this kind of approach to be unnecessary, repetitive and even counterproductive.[46]

This general critique is not confined only to states but extends to international organisations. The International Labor Organization, for example, has submitted:

> The draft articles rely excessively on the articles on the responsibility of States for internationally wrongful acts. It is considered that a parallelism between States and international organizations regarding the question of responsibility is not justified in the light of important differences between the two subjects of international law. While States exercise general jurisdiction, international organizations exercise jurisdiction specific to the competencies granted — explicitly or implicitly — by their constituent instruments.[47]

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[44] Christiane Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the "Copy-Paste" Approach' (2013) 9 *International Organizations Law Review* 53. However, Amerasinghe argues that the parallelism between the two sets of Articles is 'acceptable and correct'. CF Amerasinghe, 'Comments on the International Law Commission's Draft Articles on the Responsibility of International Organizations' (2013) 9 *International Organizations Law Review* 29, 29; Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2011) 20.

[45] International Law Commission, Responsibility of International Organizations, Comments and Observations Received from Governments (14 February 2011) United Nations Doc A/CN.4/636/Add.1, at 4 (Republic of Korea).

[46] International Law Commission, Responsibility of International Organizations, Comments and Observations Received from Governments (14 February 2011) United Nations Doc A/CN.4/636, at 8 (Portugal).

[47] International Law Commission, Responsibility of International Organizations, Comments and Observations Received from International Organizations (14 February 2011) United Nations Doc. A/CN.4/637, at 8 (International Labour Organization).

Some international organisations even requested that the ARIO be sent back to the International Law Commission for further refinement.[48] Critique from international organisations, the main subjects of the rules that they purport to outline, obviously raises the potential of the most far-reaching consequences. While international organisations are of course not entitled to vote in the General Assembly, the ARIO may risk failing in the long term if they are not perceived to be authoritative by the actors mostly concerned with them.[49]

3.2. The Principle of Speciality

In comparison to the constitutional orders of states, the constitutional order of international organisations could be said to be 'incomplete'.[50] It is incomplete because, unlike states, which have a general competence to act, an international organisation can only act where it has been delegated the power to do so by competent member states.[51] It may be better to speak, then, of the special or 'functional' nature of the legal personality and competences of an international organisation.[52] In the *Reparations* case, it was held that '[w]hereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and function'.[53] The 'principle of speciality' was explicitly recognised in the *Nuclear Weapons* case. The International Court held that:

> [i]nternational organizations … do not, unlike States, possess a general competence, but are governed by the "principle of specialty", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.[54]

It has been argued, though, that reference to the principle of speciality illustrates that the difference between the constitutions of states and international organizations 'is rather a matter

[48] International Law Commission, 'Report on the Work of its Sixty-third Session' (23 November 2011) United Nations Doc A/C.6/66SR.20, para 93 (United Nations Educational, Scientific and Cultural Organization).
[49] Ahlborn, 'The Use of Analogies' (n 44) 55.
[50] Christiane Ahlborn, 'The Rules of International Organizations and the Law of Responsibility' (2011) 8(2) *International Organizations Law Review* 397, 421.
[51] *Ibid.*
[52] Pavel Šturma, 'Drawing a Line between the Responsibility of an International Organization and Its Member States Under International Law' (2011) 2 *Czech Yearbook of Public and Private International Law* 3, 5; Tzanakopuoulos, '*Disobeying'* (n 44) 21.
[53] *Reparations*, at 180.
[54] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, para 25.

of degree than of kind'.[55] Indeed, there is perhaps weight in White's argument that 'while organisations normally do not have the same rights and duties as States, the 'complete' international legal person, they may, on occasions match them in certain areas, and indeed surpass them'.[56] However, this is of course not always the case. And, even where certain international organisations do voluntarily concede their international responsibility, others do not. This highlights the fundamental importance of acknowledging the principle of speciality.

On face value, the International Law Commission has acknowledged some degree of speciality. In this context, it is important to note Article 64 (*lex specialis*), which, under certain circumstances, may exempt an international organisation from the Article's reach. It states that:

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.[57]

However, even if the principle of *lex specialis* does indeed provide a barrier to the attribution of responsibility, the importance of Article 10 cannot be overlooked. The commentary to Article 10 ('Existence of a breach') indicates that '[t]hese special rules *do not necessarily prevail* over principles set out in the present articles', and clarifies that 'with regard to the existence of a breach of an international obligation, a special rule of the organization *would not affect* breaches of obligations that an international organization may owe to a non-Member State'.[58] It also hints at the limits of *lex specialis* with regard to breaches of an obligation of a *jus cogens* character*: '*Nor would special rules affect obligations arising from a higher source; irrespective of the identity of the subject to whom the international organization owes the obligation'.[59] In addition, Article 10(1), which addresses a breach of an international obligation resulting from the international organisation's non-conforming act 'regardless of its origin and character', may also serve as a limit the scope of *lex specialis.* As the commentary explains, '[t]his is intended to convey that the international obligation 'may be established by a customary

[55] Ahlborn, 'The Rules of International Organisations' (n 50) 421.
[56] Nigel White, *The Law of International Organisations* (Manchester University Press 2005) 69.
[57] Article 64 ARIO.
[58] ARIO (commentary) 33, at para 9.
[59] Ibid.

rule of international law, by a treaty or by a general principle applicable within the international legal order'.[60] The aforementioned would indicate that there exists a source of law which may be higher than the *lex specialis.* Ultimately, the issue of *lex specialis* is left open; the commentary 'does not attempt to express a clear-cut view on the issue'.[61]

What can perhaps be described as the 'speciality' critique, can be further sub-divided into two categories. The former relates to the failure to consider differences between international organisations and states, and the latter to the failure to take into account differences between international organisations and other international organisations. We shall address the former first. It is potentially problematic to presume that every international organisation can be made subject to the same rules of responsibility that apply to states.[62] This problem originates in part because the International Law Commission took the State Responsibility Articles as a point of departure, even though states and international organisations are very different in many aspects. In this sense, this criticism leads directly on from the first (the copy and paste approach). International organisations are not directly comparable to states, which are, in the eyes of international law, ostensibly equal.[63] All states, no matter their differences in size or power, enjoy common attributes such as sovereign equality and territorial integrity and can be presumed to have certain common primary duties that derive from a common constituent treaty, namely the Charter.[64] The same cannot be said of international organisations with such ease.

Perhaps the most striking difference is that the rules on state responsibility were based on the premise that states had sought to give effect to their mutual and reciprocal interests in affirming their responsibilities to one another. Reciprocity can be defined as a principle of international law intimately connected with the decentralized nature of the international legal order.[65] According to the principle, 'a State basing a claim on a particular norm of international law must accept that rule also as binding upon itself'.[66] As Franck wrote, the '[o]bligation is perceived to be owed to a community of states as a necessary reciprocal incident of membership

[60] Ibid 31, at para 2.
[61] Ibid 33, at para 7.
[62] cf Noemi Gal-Or and Cedric Ryngaert (n 26) 514-15.
[63] Article 2(1), United Nations Charter (1945): 'The Organization is based on the principle of the sovereign equality of all its Members'.
[64] See generally, the principles and purposes of the Charter, Articles 1 and 2, United Nations Charter (1945).
[65] Tzanakopoulos, '*Disobeying'* (n 44)128.
[66] Bruno Simma, 'Reciprocity' in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (Oxford University Press 2012)

in the community'.[67] The argument follows that although states might not enjoy being held responsible, and thus liable for breaches of their obligations, it is a price to pay for other states to be liable to them.[68] If we compare this state of affairs with that of the United Nations, there is no principle of reciprocity that would render the ARIO mutually appealing. The Security Council does not rely on other international organisations fulfilling their international obligations, *per se*, in order for it to fulfil its mandate.

Now turning to the latter point, the International Court of Justice acknowledged in *Reparations* 1949 that international organisations are not necessarily identical in nature.[69] Perhaps more surprisingly, the International Law Commission itself had earlier noted that international organisations 'vary so much that with regard to responsibility it may be unreasonable to look for general rules applying for all international organizations'.[70] Nevertheless, the ARIO do not address this issue at all. The International Law Commission has ultimately formulated rules that purport to apply equally to all international organisations, irrespective of the type of membership or purpose. Thus, the ARIO have also been criticised for not sufficiently taking into account the important differences between international organisations, for example as to the reach of their competences.[71] The drafters clearly proceeded from the assumption that there is a common thread which offers guidance to any international organisation, regardless of the specific characteristics of the organisation. So much is evident from the title of the Articles, which does not name any particular type of international organisation.[72] The Austrian delegation identified this problem explicitly in its comments to the International Law Commission:

> There is a great difference between international organizations established as discussion forums purely for conference purposes and organizations designed for the performance of activities such as peacekeeping operations. In the first case, responsibility would

[67] Thomas M Franck, 'Legitimacy in the International System' (1988) 82(4) *American Journal of International Law* 705, 753.
[68] See generally, Alvarez, 'International Organizations: Accountability or Responsibility?' (n 15).
[69] *Reparations*, at para 178.
[70] International Law Commission, Report of the Working Group on Responsibility of International Organizations, 'The Responsibility of International Organizations: Scope and Orientation of the Study' (6 June 2002) United Nations Doc A/CN.4/L.622, para 12.
[71] See Stefan Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff Publishers 2005) 405, 406.
[72] Gal-Or and Ryngaert (n 26) 511.

> remain mostly with the member States, whereas in the second case the international organization itself would be the author of acts likely to raise the issue of responsibility.[73]

Similarly, in their comments, Portugal stressed the competences and powers of international organizations, as well as the relationships between them and their members, vary considerably from organization to organization'.[74] Indeed, the European Commission has noted that there is no 'one size fits all' approach to IOs, given the significant differences between traditional international organisations and regional economic integration organizations, for example.[75]

Drawing these two overlapping criticisms together, in transposing the full range of principles set forth in the ARIO, the International Law Commission should be guided *de minimis* by the specificities of various international organisations. These specificities include their organisational structure, their nature and composition and their regulations, rules and special procedures.[76] In the final analysis, 'the differences between States and international organizations with regard to their legal and political nature and their procedures demand that the utmost care be taken when it comes to elaborating a regime for responsibility'.[77] At this juncture, such care has seemingly not been taken.

3.3. The Scarcity of Relevant Practice

Whereas the State Responsibility Articles were usually the product of existing rules, and most of the Articles have a plausible claim to reflect existing customary international law,[78] the International Law Commission had no compendium of general international organisational practice from which to work. This may be one reason why the International Law Commission originally omitted references to international organisations in their rules of state responsibility,

[73] International Law Commission, Responsibility of International Organizations, Comments and Observations Received from Governments (14 February 2011) United Nations Doc A/CN.4/636, at 5 (Austria).
[74] International Law Commission, Responsibility of International Organizations, Comments and Observations Received from Governments (14 February 2011) United Nations Doc A/CN.4/636, at 8. (Portugal).
[75] International Law Commission, Responsibility of International Organizations, Comments and Observations Received from International Organizations (14 February 2011) United Nations Doc A/CN.4/637, at 7-8 (European Commission). See also, Kristen Boon, 'New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations' (2011) 37 *Yale Journal of International Law* 1, 8.
[76] International Law Commission, Responsibility of International Organizations, Comments and Observations Received from International Organizations (14 February 2011) United Nations Doc A/CN.4/637.Add1, at 4 (United Nations).
[77] International Law Commission, Responsibility of International Organizations, Comments and Observations Received from Governments (14 February 2011) United Nations Doc A/CN.4/636, at 5 (Austria).
[78] James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 43.

even when it might have been logical to do so.[79] Although they address the same set of issues, the ARIO are grounded in far less practice than the State Responsibility Articles. Indeed, when the International Law Commission asked selected international organisations to document their responses when charged with violating international law, several reported that no such claims had ever been made.[80] There are very few express statements on the responsibility of international organisations of any kind in international treaties.[81] In addition, because international organisations are often protected by privileges and immunities, there are very few instances where principles of responsibility have been invoked before either national or international courts. The International Court of Justice, the principal judicial organ of the United Nations,[82] has never directly addressed the consequences of international organisations violating international obligations.[83]

The scarcity of relevant practice is highlighted by the fact that the International Law Commission commentary is only able to identify two examples in support of the principle of United Nations responsibility. Firstly, the International Law Commission commentary quotes the United Nations Secretary-General explaining the United Nations' longstanding practice of settling claims related to injuries caused by United Nations peacekeepers in terms of the organisation's international responsibility.[84] The only other support the International Law Commission adduces is a quotation from the *Difference Relating to Immunity* advisory

[79] For example, in connection with Article 16, State Responsibility Articles, in which states 'aid' or 'assist' another to commit a wrongful act. It is not clear on what basis it is assumed that the 'other' legal person in this scenario could not be an international organisation.

[80] International Law Commission, Responsibility of International Organizations: Comments and Observations Received from International Organizations, (25 June 2004) UN Doc A/CN.4/545, at 33.

[81] The Charter is silent on the issue of responsibility; cf Articles 5 and 6, United Nations Convention on the Law of the Sea (1982) (Annex 9: Participation of International Organizations).

[82] Article 92, United Nations Charter (1945).

[83] The International Court of Justice avoided making any reference whatsoever to the ARIO in two recent decisions where reference might have been expected: see eg, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)* (Judgment) [2011] ICJ Rep 644; *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (Advisory Opinion) [2012] ICJ Rep 10.

[84] ARIO (commentary) at 78. See UNGA, Report of the Secretary-General, 'Administrative and Budgetary Aspects of the Financing of United Nations Peacekeeping Operations' (20 September 1996) United Nations Doc A/51/389, at 4. However, the United Nations has also explained this practice in terms of its treaty obligations under the Convention on the Privileges and Immunities of the United Nations (1946). Section 29 requires the United Nations to 'make provision for appropriate modes of settlement' of 'disputes of a private law character' and disputes involving 'any official of the United Nations who by reason of his official position enjoys immunity'. These disputes do not necessarily involve violations of international law; the United Nations includes arbitration clauses in its commercial contracts and leases pursuant to section 29, for example. See, on this point, Daphna Shraga, 'United Nations Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage' (2000) 94 *American Journal of International Law* 406; Daugirdas (n 38) 995-6.

opinion.[85] The case arose after Malaysian companies sued a United Nations Special Rapporteur for defamation based on comments he made during an interview with a magazine reporter. The International Court's opinion concluded with the observation that:

> [...] the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity … The United Nations may be required to bear responsibility for the damage arising from such acts.[86]

Daugirdas persuasively submits that the above statement is a description of the United Nations' primary obligations under the Geneva Convention and not a statement about the consequences of violations of international law.[87] She argues that the Special Rapporteur's allegedly defamatory acts may have caused harm and violated Malaysian law, but there is no claim that the Special Rapporteur or the United Nations violated *international* law.[88] As such, the case cannot persuasively be used as an example of international organisational practice as to the engagement of responsibility. Where the International Law Commission could only point to two examples from the (then) sixty-six-year history of the United Nations in its commentary, and considering that both of these examples can be questioned on the grounds of their applicability, perhaps wider and deeper questions need to be asked.

In the final analysis, many of the individual Articles have little claim to reflect extant international law, and as proposals to progressively develop the law they are inherently controversial.[89]

4. The Problem of Attribution

The term 'attribution' is used to denote the operation of attaching a given action or omission to an international organisation.[90] The attribution of conduct to an actor capable of bearing

[85] *Difference Relating to Immunity* (n 37).
[86] Ibid at para 66.
[87] Daugirdas (n 38) 996.
[88] Ibid.
[89] Ibid 997.
[90] State Responsibility Articles (commentary) at 36, para 12. The ICJ has more commonly used the term 'imputation'. See eg, *United States Diplomatic and Consular Staff in Tehran (USA v Iran)* (Judgment) [1980] ICJ Rep 3, paras 56-58; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, at 51, para 86.

responsibility under international law is 'essential', according to the International Law Commission, for an internationally wrongful act to occur.[91] But, of course, no (fictional) legal person has an actual physical presence. The problem of attribution derives, therefore, from the fact that conduct always originates in individuals, that is to say natural persons, rather than in (fictional) legal entities, such as a state or international organisation.[92] As the Permanent Court of International Justice held previously, 'States can act only by and through their agents and representatives'.[93] The same is true for international organisations.[94] Thus, as Tzanakopoulos contends, 'the "normative" or intellectual operation of attribution is necessary to bridge the gap between the acting individual and the subject of (international) law'.[95]

For the United Nations, as an international organisation, to become responsible in international law for Security Council conduct it must be shown that conduct which is attributable to the United Nations is not in conformity with what is required of it under international law.[96] Attributing direct Security Council conduct to the United Nations appears, in the first instance, to be relatively straightforward, and 'can be disposed of quickly'.[97] A decision of the Security Council is an act that is attributable to the United Nations as an act of one of its organs,[98] both under customary international law,[99] and according to the general rule of attribution reflected in Article 6(1) ARIO. The rule states that:

> [t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect of the organization.[100]

[91] International Law Commission, Report on the Work of its Fifty-Fifth Session', (5 May-6 June and 7 July-8 August 2003) United Nations Doc A/58/10, para 4.
[92] Tzanakopoulos, '*Disobeying'* (n 44) 17; Wilde (n 37) 402.
[93] *Questions Relating to Settlers of German Origin in Poland* (Advisory Opinion) [1923] PCIJ Rep Series B No 6, at 22.
[94] Stefan Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in Maurizio Ragazzi (ed), *International Responsibility Today. Essays in Memory of Oscar Schachter* (Martinus Nijhoff Publishers 2005) 405, 410; Tzanakopoulos, '*Disobeying'* (n 44) 17.
[95] Ibid 17-8.
[96] See Articles 3, 4 and 10 ARIO.
[97] Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in Phil Shiner and Andrew Williams (eds), *The Iraq War and International Law* (Hart 2008) 185, 222.
[98] Article 7(1), United Nations Charter (1945).
[99] Talmon (n 97) 222.
[100] Article 6(1) ARIO.

This basic principle, that international organisations are responsible for the acts of their organs also finds support in the jurisprudence of the International Court of Justice and other international courts.[101] It also reflects United Nations practice, at least in regard to peacekeeping operations. It is true that the United Nations in principle accepts responsibility for the deployment of national contingents in a peacekeeping force, even where the peacekeeping force receives its mandate from the Security Council. This premise led the United Nations Legal Counsel to state:

> As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation.[102]

However, when the conduct that is to be attributed ceases to be purely 'normative', but rather constitutes action 'on the ground', the question of attribution transcends into a much 'thornier' issue.[103] In these circumstances, 'attribution of a wrongful act to an international organization may be a difficult affair'.[104] For the purposes of this section, it is sufficient to draw attention to two notable examples within Security Council practice to highlight this potential lacuna in the law of responsibility. Firstly, the realisation of the Security Council's mandate in the field of non-forcible measures, under Article 41, most commonly through the implementation of collective or individual sanctions is inherently reliant on member states.[105] Secondly, the 'authorisation method' employed by the Security Council in order to realise its mandate under Article 42 Charter illustrates how the problem of attribution is particularly pertinent in the realm of Security Council coercive measures, in the absence of any agreements set out in Article 43 Charter.[106] In practice, rather than the Security Council directly employing force

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[101] *Difference Relating to Immunity* (n 37) at para 66; cf *Behrami and Behrami v France* and *Saramati v France, Germany and Norway* (Grand Chamber, Admissibility) App Nos 71412/01 and 78166/01 (2 May 2007) at para 143, in which the European Court of Human Rights held that as UNMIK was a subsidiary organ of the United Nations created under Chapter VII of the Charter, 'the impugned inaction was, in principle, "attributable" to the United Nations in the same sense'.

[102] International Law Commission, Responsibility of International Organizations: Comments and Observations Received from International Organizations (25 June 2004) United Nations Doc A/CN.4/545, at 17 (comments of United Nations Secretariat).

[103] Tzanakopoulos, '*Disobeying'* (n 44)17.

[104] Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn, Cambridge University Press, 2009) 280.

[105] See Chapter 1, section 4.1.1.

[106] Article 43(1) reads in full: 'All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage,

itself, it has instead come to 'authorise' states or coalitions of states to use force ─ or, as the Security Council phrases it, 'all necessary means' ─ as a pragmatic response, to achieve a particular mandate.[107] Therefore, the more complex, but simultaneously more important, question relates to whether the conduct of member states, in implementing binding Chapter VII resolutions,[108] can be attributable to the United Nations, by virtue of member states being viewed as an 'agent' of the Security Council in the context of Article 6(1).

To answer that question, we need really to ask *why* the United Nations delegates a great deal of its forcible and non-forcible powers to member states in certain circumstances. The ICTY may provide some guidance. As the Appeals Chamber in *Tadić* found: 'It is only for want of … resources that the United Nations has to act through its Members … Action by Member States on behalf of the Organization is but a poor substitute *faute de mieux,* or a "second best" for want of the first'.[109] Considering this, it is submitted that, as the original decision, and its legally binding force, derives from the Security Council, the burden must surely be high to constitute a *novus actus interveniens,* and break the causal chain from Security Council conduct to internationally wrongful act. This is supported by the fact that, according to the ICJ in *Reparations,* the term 'agent' is to be understood 'in the most liberal sense'.[110] There is, seemingly, no requirement for an official or institutional link, but rather an agent should be understood as any natural or legal person 'through whom [the Organization] acts'.[111] To one commentator, 'this very wide definition of an agent applies to the United Nations as the definition accepted in United Nations practice, and thus under the rules of the Organization'.[112]

4.1. Between Effective Control and Effective 'Normative' Control

While we note, therefore, that state organs may theoretically be caught within the scope of 'agents' in the context of Article 6(1), the key question in relation to the attribution of conduct

necessary for the purpose of maintaining international peace and security'. Article 43(1), United Nations Charter (1945).

[107] See generally, Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the United Nations Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"' (2000) 11(3) *European Journal of International Law* 541. See also, Chapter 1, section 4.1.2.

[108] Such resolutions are binding under Article 25, United Nations Charter (1945). On the nature and scope of Article 25, see Chapter 1, section 3.1.

[109] *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995), at para 36.

[110] *Reparations,* at 177.

[111] Ibid.

[112] Tzanakopoulos, '*Disobeying'* (n 44) 33.

is one of *control.* Here we see that the original premise, that 'power breeds responsibility' can also be framed in other terms but with the same underlying idea, for instance in the argument that responsibility originates in control.[113] Thus, according to the International Law Commission, conduct is in principle attributable to the United Nations, unless this presumption is questioned by the exercise of 'effective control' by the contributing state. Article 7 ARIO states that:

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization *if the organization exercises effective control* over that conduct.[114]

The meaning of *effective control* is, however, contested. We can point to at least three different interpretations. It is logical to begin with the traditional view, which has been to interpret the question of control in a narrow, restrictive sense. According to the International Law Commission, the criterion for attribution is *factual* control, namely whether it is the state or the organisation that exercises factual control over the conduct in question.[115] This is traditionally taken to mean that to attribute conduct to the United Nations, it must be established that the United Nations (through the Security Council) was, in fact, exercising effective control over the susceptible conduct of a state in the specific instance ─ mere control by virtue of law not being sufficient.[116] This orthodox position has been articulated by the ICJ, for example in *Nicaragua,* where it was held that the wrongful conduct will be attributed to the body that specifically 'directed or enforced the perpetration of the acts'[117] and in the *Genocide* case, where the Court held that '[i]t must … be shown that this "effective control" was exercised … in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations'.[118]

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[113] André Nollkaemper, 'Power and Responsibility' (2014) SHARES Research Paper 42, ACIL 2014-22, <http://www.sharesproject.nl/wp-content/uploads/2014/06/ACIL-2014-22-Power-and-Responsibility-AN.pdf>
[114] Article 7, IO ARIO (own emphasis added).
[115] ARIO (commentary) at 20, para 4.
[116] Tzanakopoulos, '*Disobeying'* (n 44) 40.
[117] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, at para 115.
[118] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v *Serbia and Montenegro* (Judgment) [2007] ICJ Rep 43, at para 400.

This restrictive view is in many ways intuitive: fair principles of responsibility would surely locate responsibility with the actor who is in a position of factual control over the wrongful acts giving rise to responsibility, as assumingly such control places the actor in a position to take the relevant measures to prevent the commission of the internationally wrongful act. In short, the argument follows: 'that which one cannot control, one cannot prevent … that which one cannot prevent, should not and cannot engage one's responsibility.[119]

However, in utilising such a narrow understanding of control, it becomes extremely difficult to attribute the acts of member states in the implementation of binding Chapter VII resolutions to the Security Council. In fact, it has been suggested that Article 6(1) seems to refer almost exclusively to national military contingents put at the disposal of the United Nations for peacekeeping operations,[120] and cannot be extended beyond this narrow context. This may go some way to explaining the consistent position of the United Nations itself. The Organisation has maintained that it is responsible only for missions or operations under its control, not for authorised missions under national command.[121] Specifically, the United Nations has long refused to be held responsible for wrongful acts committed in the framework of enforcement action under Chapter VII of the Charter. In 1996 the Secretary-General asserted that:

> [t]he international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations. Where a Chapter vii-authorized operation is conducted under national command and control, international responsibility for the activities of the force is vested in the State or States conducting the operation.[122]

This position was maintained in the United Nations' comments to the International Law Commission, 'the United Nations … has refused to entertain claims against … military

[119] Gal-Or and Ryngaert (n 26) 529.
[120] Tzanakopoulos, '*Disobeying'* (n 44) 38. This is seemingly also the position adopted by the International Law Commission. See ARIO (commentary) at 110, paras 1-2 and at 111-15, paras 5-9.
[121] The force of this traditional view is perhaps best highlighted in the case concerning *Legality of the Use of Force*. The ICJ did not have the opportunity to rule on merits in the case, despite the argument in the Preliminary Objections put forward by France, that 'NATO is responsible for the 'direction' of KFOR and the United Nations for 'control' of it, as the other nine NATO member states sued before the ICJ did not share this argument. *Case Concerning Legality of the Use of Force (Yugoslavia v France)* (Written Proceedings, Preliminary Objections) (5 July 2000), at para 46. See Pavel Šturma, 'Drawing a Line between the Responsibility of an International Organization and Its Member States Under International Law' (2011) 2 *Czech Yearbook of Public and Private International Law* 3, 12-13.
[122] Report of the Secretary-General, 'Administrative and Budgetary Aspects of the Financing of United Nations Peacekeeping Operations' (20 September 1996) United Nations Doc A/51/389
(20 September 1996) United Nations Doc A/51/389, at para 17.

operation ─ notwithstanding the fact that they were authorized by the Security Council. This practice has been uniform, consistent and without exception'.[123]

If the question is really one of control, then a return to the International Law Commission's commentary on state responsibility may be illuminating. Here, albeit in a somewhat different context, the International Law Commission noted that '[a]ttribution of conduct to the contributing State is clearly linked with the retention of some powers by that State'.[124] The factual control argument would seemingly imply that the Security Council has released all power to the member state. Yet, on the contrary, is the opposite not true? Of course, Article 25 establishes a legal obligation on members to carry out decisions of the Security Council.[125] And this is further compounded by Article 103 Charter.[126]

All this considered, the factual control exercised by the Organisation over member states in its sanctioning practice and through the 'authorisation method' is limited at best, and in most cases it will be non-existent. The implementation of a Security Council resolution often leaves no room for manoeuvre for the implementing state. If attribution is linked to the retention of power only, member states, in these circumstances, on the contrary, are rendered essentially *powerless*. In this light, Tzanakopoulos has coined the expression 'effective normative control' as distinct from 'effective control'. To the author, member states are under the effective normative control of the United Nations when they have no discretion or no 'margin of appreciation' in the implementation of a binding normative act of the organisation.[127] In this context, the United Nations may be seen as normatively (if not factually) controlling the conduct of the state. In other words, effective control is not exercised factually on the ground, but normatively through the imposition of an international obligation.[128]

[123] International Law Commission, Responsibility of International Organizations, Comments and Observations Received from International Organizations (14 February 2011) United Nations Doc A/CN.4/637.Add1, at 12 (United Nations).
[124] ARIO (commentary) at 21, para 7.
[125] Article 25, United Nations Charter (1945); also relevant in this context is Article 2(5), which requires that members states 'give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action'.
[126] See, chapter 1, section 2.
[127] Tzanakopoulos, '*Disobeying'* (n 44) 40.
[128] Tzanakopoulos, 'Strengthening Security Council Accountability' (n 4) 8.

The idea of 'normative control' also seems to resonate with the controversial decision of the European Court of Human Rights in the joined *Behrami* and *Saramati* cases, dealing with attribution of responsibility for acts of contingents placed at the disposal of the United Nations Interim Administration Mission in Kosovo (UNMIK) or authorized by the United Nations – Kosovo Forces (KFOR) of NATO. Referring to the work of the International Law Commission, the Court interpreted in a highly unusual way the criterion of 'effective control'. Departing from the meaning of the term articulated in *Nicaragua* and the *Genocide* case, the Court took the view that the decisive factor was whether 'the United Nations Security Council retained ultimate authority and control so that operational command only was delegated'.[129] The Court concluded that 'KFOR was exercising lawfully delegated Chapter VII powers of the Security Council so that the impugned action was, in principle, 'attributable' to the United Nations'.[130]

The jurisprudence of the European Court of Human Rights on this issue has faced scathing criticism from the academic community. [131] To Milanovic and Papic, for example, '[i]t is rare for one to see a judgment of a court as eminent as is the European Court of Human Rights which is as troubling'.[132] The crux of the critique is that the decision, if taken to its logical conclusion, may provide states with a carte blanche, to 'do whatever they wish and escape any human rights scrutiny so long as they shield themselves by obtaining the imprimatur of an international organization'.[133] Erika de Wet had indeed earlier warned that this may create 'a dangerous loophole by which member states, by exercising powers in the context of an international organization rather than unilaterally, could evade international responsibility for

[129] *Behrami* and *Saramati,* at para 133.
[130] Ibid, at para 141. Interestingly, the European Court of Human Rights has also taken the same position in other decisions concerning attribution to the United Nations of conduct by national contingents allocated to KFOR. See eg, *Kasumaj v Greece* (Admissibility) App No 6974/05 (5 July 2007); *Gajić v Germany* (Admissibility) App no 31446/02 (28 August 2007). Furthermore, in *Berić*, the Court reiterated its previous decision in *Behrami* and *Saramati* and reached the conclusion that the conduct of the High Representative in Bosnia and Herzegovina also had to be attributed to the United Nations. See, *Berić and others v Bosnia and Herzegovina* (Admissibility) App No 36357/04 (16 October 2007).
[131] See eg, Marko Milanovic and Tatiana Papic, 'As Bad as it Gets: the European Court of Human Rights' Behrami and Saramati Decision and General International Law' (2009) 58 *International and Comparative Law Quarterly* 267; K William Watson, '*Behrami v. France*: Constructive Blue Helmets Protect KFOR Nations from Accountability' (2008) 16(2) *Tulane Journal of International and Comparative Law* 575; Pierre Bodeau-Livinec, Gionata P Buzzini and Santiago Villalpando, 'Agim Behrami and Bekir Behrami v. France; Ruzhdi Saramati v. France, Germany and Norway. Joined App. Nos. 71412/01 and 78166/01' (2008) 102(2) *American Journal of International Law* 323; Alexander Breitegger, 'Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of *Behrami and Saramati* and *Al Jedda*' (2009) 11 *International Community Law Review* 155; Heike Krieger, 'A Credibility Gap: The *Behrami and Saramati* Decision of the European Court of Human Rights' (2009) 13 *Journal of International Peacekeeping* 159.
[132] Ibid 267.
[133] Ibid.

its obligations to respect human rights.'[134] The case reminds us of the importance of piercing through the 'institutional veil'.[135] To be sure, in becoming members of an international organisation, member states disappear to a certain extent behind the 'institutional veil' of the organisation. It is important to note, however, that by constituting a new legal person, states do not give up their legal personality under international law.[136] By conferring powers to an international organisation, states merely limit their own autonomy in order to allow the international organisation to take decisions independently, but they continue to function side-by-side with the international organisation to the extent that they have retained their powers.[137] From the point of view of the individual victim, state attribution is also key as it provides the only viable route to legal recourse in the domestic setting.

Considering such criticism, it is perhaps unsurprising that the more recent case law seemingly denotes a return to the status quo. In *Al Jedda,* the European Court of Human Rights held that the applicant's detention was not attributable to the United Nations, 'given that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force'.[138] In the United Kingdom House of Lords, Lord Bingham had distinguished the facts in *Al Jedda* from those in *Behrami/Saramati*. He reasoned that the United Nations mandate in Iraq is a limited one focused on humanitarian relief and reconstruction; the United Nations had not dispatched the coalition forces to Iraq nor given the coalition a United Nations mandate, and the Security Council was not delegating its power to the United Kingdom *per se* but rather authorising it to carry out functions it could not perform itself.[139] Subsequently, the fact that the European Court referred to effective control and that it finally considered that the wrongful conduct was not attributable to the United Nations in Al-Jedda's appeal to the Strasbourg court, has led some

[134] Erika de Wet, *Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) 380-381.
[135] Catherine Brolmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing 2007).
[136] Ahlborn, 'The Rules of International Organisations' (n 50) 416.
[137] Ibid.
[138] *Al-Jedda v United Kingdom* (Grand Chamber, Judgment) App No 27021/08 (7 July 2011), at para 84.
[139] *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, at paras 338-39; cf ibid, dissenting opinion of Lord Rodger, who instead followed the reasoning in *Behrami,* and determined that had the United Nations retained 'ultimate control', and should have incurred responsibility for the wrongful acts. *Ibid* at para 373. Note, however, that the ECtHR dismissed the appeal in this case. Citing the ARIO and finding that the wrongs were attributable to the UK not the United Nations, the Court ruled that in contrast, the 1267 cases arose within the territory of member states, resulted from the authorities of those states, and were ascribable to those states. The actions could not therefore be attributed to the United Nations even though the source of the obligation arose from a Security Council resolution.

authors to suggest that in *Al-Jedda*, the Court operated 'a 180 degree turn'[140] from the *Behrami/Saramati* decision.

The *Behrami/Saramati* decision has rightly been criticised for delving too far from doctrinal orthodoxy. Yet the doctrinal orthodoxy is itself ill-fitted to deal with the very real problem of the Security Council protecting itself from its international responsibility through the use of its sanctioning practice or the 'authorisation method' when it is the Security Council itself that creates the legal obligation for states, essentially, to commit an internationally wrongful act. One might proffer that at play here is actually the 'institutional veil' in reverse. That is, a form of the 'double evasion', namely the problem that the Security Council can successfully evade responsibility by pointing to the members on which it must rely for implementation, while the members will attempt to rid themselves from responsibility by claiming that they are bound to implement a Security Council decision with no choice.[141]

Indeed, both options appear difficult to reconcile with the overriding rationale behind IO Responsibility; that is, to generate additional sources of responsibility to apprehend complex situations that may fall outside the scope of state responsibility.[142] Potentially providing an (unstable) bridge between these dichotomies stands the principle of derivative responsibility. We move, therefore, to a potential third (ancillary) interpretation, one that offers a 'connected' construction and implies a dual responsibility of both the member states and the Security Council. Such an ancillary responsibility of the United Nations can be established if the United Nations could be said to aid or assist[143] to direct and control,[144] or to coerce a member in the commission of a wrongful act.[145] Indeed, the International Law Commission commentary states that 'the adoption of a binding decision on the part of the international organization could

[140] Pavel Šturma, 'Drawing a Line between the Responsibility of an International Organization and Its Member States Under International Law' (2011) 2 *Czech Yearbook of Public and Private International Law* 3, 14.
[141] Anne Peters, 'Targeted Sanctions after Affaire Al-Dulimi et Montana Management Inc. C. Suisse: Is There a Way Out of the Catch-22 for United Nations Members?' *EJIL: Talk!* (4 December 2013) <http://www.ejiltalk.org/targeted-sanctions-after-affaire-al-dulimi-et-montana-management-inc-c-suisse-is-there-a-way-out-of-the-catch-22-for-un-members/>
[142] Jean D'Aspremont, 'The Law of International Responsibility and Multi-layered Institutional Veils: The Case of Authorized Regional Peace-Enforcement Operations' (2013) SHARES Research Paper 24, ACIL 2013–10 <http://www.sharesproject.nl/wp-content/uploads/2013/06/SHARES-RP-24-final.pdf>
[143] Article 14 ARIO.
[144] Article 15 ARIO.
[145] Article 16 ARIO.

constitute, under certain circumstances, a form of direction or control in the commission of an internationally wrongful act'.[146] In this light, Article 17 reads:

> An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.[147]

Derivative, or indirect, responsibility would certainly seem to have more relevance for international organisations, due to the number of actors involved in the implementation of their decisions.[148] However, resort to the commentary on the State Responsibility Articles would infer that derivative responsibility is to be reserved for exceptional circumstances.[149] This will surely have some bearing on any relevant considerations. Having said that, this provision is seemingly the only way the United Nations can be held responsible for the acts of states implementing a binding Security Council resolution passed under Chapter VII of the Charter.

Conclusion

This chapter has explored the doctrine of international responsibility and has characterised the doctrine as *one of* the legal components within the (broader) concept of accountability. In relation to the engagement of the international responsibility of the United Nations, via the perpetration of an internationally wrongful act by the Security Council, the International Law Commission's ARIO have been identified as the most relevant legal instrument. Having identified a number of general criticisms that have been levelled against the direct transposition of the rules of state responsibility in this context, it is important at this juncture to remember that the International Law Commission's articles are still in their formative years and are, at the very least, the main authoritative instrument available. The ARIO will clearly play an important role in determining the application and effect (if any) of the law of responsibility for international organisations. Nevertheless, for the reasons sketched in this chapter, the transposition of the doctrine from states, the primary actors in international law, to international

[146] ARIO (commentary) at 38.
[147] Article 17, ARIO.
[148] See generally, Lozanorios (n 29) 150.
[149] See, State Responsibility Articles (commentary) at 65, para 8: '[t]hese are exceptions to the principle of independent responsibility and they only cover certain cases'.

organisations may, as Alvarez suggests, be 'at best premature and at worst misguided'.[150] The reasons are twofold. First, there is a lack of evidence that such a transposition has received widespread support in the practice of international organisations and their member states – a necessary requirement for the doctrine to gain validity as a principle of customary international law applicable to the Security Council. Second, the universal doctrine of international responsibility fails to capture the nature of the Security Council as an institution *sui generis*.

In relation to our specific inquiry, there is one final point to add. The doctrine of legal responsibility concentrates on only one aspect of the three dimensions of accountability (holding to account). By its nature, it can only be invoked *after* a decision has been made, as it presupposes a breach of an international obligation. The doctrine is therefore inherently corrective; it is engaged *ex post facto* as a response to an internationally wrongful act. It is therefore mute in relation to the first dimension of accountability, the notion of 'giving an account'. It also applies to only one aspect of the Security Council's accountability deficit (affirmative, unlawful, conduct). It is important to ascertain whether this inchoate version of accountability is a symptom of the doctrine of international responsibility, *per se*, or whether it is indicative of the broader theoretical approach that international responsibility is rooted in, and driven by. The next chapter explores the theory of legal constitutionalism more broadly in relation to each dimension of the concept of accountability.

[150] José Alvarez, 'Book Review: Dan Sarooshi, International Organizations and Their Exercise of Sovereign Powers' (2007) 101 *American Journal of International Law* 674, 677.

V. Security Council Accountability through the Lens of Liberal-Legal Constitutionalism

Introduction

As we clarified in chapter three, while constitutionalism has been defined in different ways, a common starting point is the principle that political power must be exercised within the limits of law.[1] Mirroring this starting point, Jan Klabbers points to the recent emphasis placed on constitutionalism within organisations (as opposed to constitutionalism of the international order within which international organisations operate), as relating to the idea that 'if somehow organizations can be turned into constitutional creatures, then they can be controlled'.[2] Against this normative frame, constitutionalism is perceived simply as 'a theory of limited government'.[3] Loughlin suggests that '[i]ts key principles are independence of the judiciary, separation of governmental powers, respect for individual rights, and the promotion of the judiciary's role as guardians of constitutional norms'.[4] Loughlin argues that: '[a]t its core, constitutionalisation presupposes legalisation; as greater swathes of public life are brought within the ambit of constitutional norms, so too are they disciplined by formal legal procedures. Global constitutionalism, according to this perspective, therefore, represents the process of extending the main tenets of liberal-legal constitutionalism to all forms of governmental action'.[5]

It has been observed that 'commitment to human rights, democracy and the rule of law – *the Trinitarian mantra of the constitutionalist faith* – is part of the deep grammar of the modern constitutionalist tradition'.[6] Human rights and the rule of law clearly inform a great deal of the debate on Security Council accountability, especially if the rule of law is understood to incorporate some reference to the idea of the separation of powers, or at least the constitutional

[1] Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity within Diversity* (5th edn, Martinus Nijhoff 2011) 10.
[2] Jan Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism' in Jan Klabbers and Asa Wallendahl (eds), *Research Handbook on the Law of International Organizations'* (Edward Elgar 2011) 1, 14-15.
[3] Martin Loughlin, 'What is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (Oxford University Press 2010) 55.
[4] Ibid.
[5] Ibid 61.
[6] Mattias Kumm, Anthony F Lang Jr, James Tully and Antje Wiener, 'How Large is the World of Global Constitutionalism' (2014) 3(1) *Global Constitutionalism* 1, 3 (emphasis in original).

limitation of power.[7] In arguing that conventional approaches to the question Security Council accountability are essentially based on a liberal-legal constitutionalist project, we can see that the rule of law,[8] the protection of human rights,[9] and the separation of powers,[10] feature heavily. Discussion of democratic accountability is conspicuously absent from the nascent debate.

This chapter examines the three dimensions of accountability: 'giving an account', identification of standards, and 'holding to account' through the lens of legal constitutionalism. It argues that considering the ambiguity surrounding the extent to which the Council is bound by either the *lex specialis* of the Charter or general international law, and the incapacity of the International Court of Justice or regional and domestic courts to directly review Council decisions, there is good reason to be sceptical of this (rather incomplete) picture. In the final chapter, Security Council decision-making will be examined through the lens of political constitutionalism, with the explicit aim of injecting the third element of the Trinitarian mantra – the 'holy ghost' of democracy – into the accountability debate.

1. Transparency: No Duty to Give Reasons

[7] TRS Allen, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2001) 31: 'When the idea of the rule of law is interpreted as a principle of constitutionalism, it assumes a division of governmental powers or functions that inhibits the exercise of arbitrary state power'.

[8] Enzo Cannizzaro, 'A Machiavellian Moment? The UN Security Council and the Rule of Law' (2006) 3 *International Organizations Law Review* 189.

[9] See, eg, Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians* (Cambridge University Press 2011); Antonios Tzanakopoulos, 'Collective Security and Human Rights' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012); Christopher Michaelsen, 'Human Rights as Limits for the Security Council: A Matter of Substantive Law or Defining the Application of Proportionality'(2014) 19(3) *Journal of Conflict and Security Law* 451; Erika de Wet, 'The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View' in Erika de Wet and André Nollkaemper (eds), *Review of the Security Council by Member States* (Intersentia 2003); Erika de Wet, 'From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions' (2013) 12 *Chinese Journal of International Law* 787; Iain Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72(2) *Nordic Journal of International Law* 159; Gerhard Thallinger, 'Sense and Sensibility of the Human Rights Obligations of the United Nations Security Council' (2007) 67 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 1015.

[10] Nicholas Tsagourias, 'Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity' (2011) 24(3) *Leiden Journal of International Law* 539; Björn Elberling, 'The Ultra Vires Character of Legislative Action by the Security Council' (2005) 2 *International Organizations Law Review* 337; Eric Rosand, 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?' (2005) 28 Fordham International Law Journal 542; Stefan Talmon, 'The Security Council as World Legislator' (2005) 99 *American Journal of International Law* 175; Axel Marschik, 'Legislative Powers of the Security Council' in Ronald St John Macdonald and Douglas M Johnston (eds), Towards World Constitutionalism: Issues in the Legal Ordering of the World Community (Nijhoff 2005) 457; Keith Harper, 'Does the United Nations Security Council Have the Competence to Act as Court and Legislature?' (2005) 27 *New York University Journal of International Law and Politics* 103.

As a preliminary observation, the general idea of a positive duty to give reasons is entirely compatible with a legal constitutionalist frame. Reason-giving has to be characterised as 'one of the essential properties of the concept of the rule of law, if not *the* essential one'.[11] A duty to give reasons is embedded in a number of domestic constitutional orders. In some jurisdictions, the issue is addressed legislatively.[12] In other jurisdictions, the task has been developed by courts. In the United Kingdom, for example, while there is no generally accepted duty,[13] the range of specific situations in which a common law duty will be imposed has been continuously developed and expanded.[14] International organisations are also not entirely unfamiliar with the concept. The Treaty on the Functioning of the European Union, for example, stipulates that '[l]egal acts shall state the reasons on which they are based'.[15]

Anne Peters argues that 'giving reasons for legal acts (and for their omission) is instrumental in enabling members to exercise scrutiny and to formulate critique'.[16] The question of whether such a duty binds the Security Council has been addressed in relation to both non-forcible and forcible measures. In relation to the 1267 counter-terrorism sanctions regime, we will recall, a key element of the accountability deficit is a lack of transparency. Specifically, individuals and entities who are targeted are rarely provided a justification as to *why* they have been listed, and what they need to do in order to be delisted.[17] In this context, a duty to give reasons is associated with the right to a fair hearing, guaranteed by Article 10 of the Universal Declaration of Human Rights, Article 14(1) of the International Covenant on Civil and Political Rights and a number of regional human rights instruments.[18] As such, it has been argued that the right to be informed

[11] Daniel Moeckli and Raffael N Fasel, 'A Duty to Give Reasons in the Security Council: Making Voting Transparent' (2017) 14 *International Organizations Law Review* 13, 67.
[12] See, eg, Administrative Decisions (Judicial Review) Act (1977), s13; Administrative Law Act (1978), s8 (both Australia).
[13] *R v Secretary of State for the Home Department Ex parte Doody* [1994] 1 AC 531, at 564 (per Lord Mustill: 'the [common] law does not at present recognise a general duty to give reasons for an administrative decision'.
[14] See, generally, Mark Elliott, 'Has the Common Law Duty to Give Reasons Come of Age Yet?' (2011) *Public Law* 56.
[15] Consolidated Version of the Treaty on the Functioning of the European Union (2007), art 296; *Nexans SA and Nexans France SAS v Commission* [2012] European Court of Justice, Case C-37/13 P, para 31: statements of reasons 'must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it'.
[16] Anne Peters, 'Article 24' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus, *The Charter of the United Nations: A Commentary* (3rd edn, vol 1, Oxford University Press 2012) 780.
[17] See, chapter 1, section 4.1.1.
[18] (European) Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953; as amended) 213 UNTS 222, art 6(1); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 8(1); African Charter of Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, art 7(1).

about the reasons for a decision affecting individual interests is a key element of a 'universal minimum of due process', which, according to Bardo Fassbender, should be considered as forming part of customary international law and as also protected by general principles of law in line with the meaning of Article 38(1) of the International Court of Justice Statute.[19] Fassbender argues specifically that the Security Council has 'a legal obligation of the Council to comply with standards of due process, or "fair and clear procedures"'.[20]

The working methods of the Security Council are 'informed by the practice of diplomacy, where secrecy and informal processes are more important than open and public debates'.[21] Of course, transparency and access to information are not unqualified rights (if they amount to rights at all). This is particularly true when we consider the sensitivity surrounding the Security Council's functional remit: matters of international peace and security. In relation to forcible measures, the lack of transparency speaks to both extremes of Council practice (action and inaction).[22] In relation to the delegation method of authorising the use of force under Chapter VII, some commentators do, indeed, go as far as to suggest that the Security Council has an 'obligation … to ensure that it specifies in some detail the objectives for which Chapter VII powers are being delegated'.[23] Danesh Sarooshi has argued that a corollary of this position is that there are certain limits on the Security Council's power of delegation: a minimum degree of clarity, a requirement for some form of supervision on the part of the Council, and a requirement that the Council oblige member states to report on the way in which the delegated powers are being exercised.[24] According to Nigel White, [w]hat is required is a clear indication by the Security Council of the extent and nature of the armed force that it is requesting States to undertake. Problems of lack of continuous control can be overcome by a clear and unambiguous mandate at the outset'.[25] In relation to inaction,

[19] Bardo Fassbender, 'Targeted Sanctions and Due Process' (20 March 2006) Study commissioned by the United Nations Office of Legal Affairs <http://www.un.org/law/counsel/Fassbender_study.pdf> at 15.
[20] Ibid.
[21] Nicholas Tsagourias and Nigel D White, *Collective Security: Theory, Law and Practice* (Cambridge University Press 2013) 349.
[22] See, chapter 1, sections 4.1 and 4.3 respectively.
[23] Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Clarendon Press 1999) 156.
[24] Ibid 155-163.
[25] Nigel D White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (1993) 103-104. See, further, Report of the Secretary-General to the Security Council (30 November 1992) UN S/24868, at 6 (relating to the situation in Somalia): 'if forceful action is taken, it should preferably be under the United Nations command and control. If it is not feasible, an alternative would be an operation undertaken by member states acting with the authorisation of the Security Council. *In either case the objectives of the operation should be precisely defined and limited in time'* (emphasis added).

due to the invocation of the permanent member veto, when it became apparent that the veto would not be eliminated or restricted in the foreseeable future, some member states proposed that the permanent members should at least be required to explain their rationale for having cast a veto.[26]

Others have framed their argument in terms of the Responsibility to Protect. Moeckli and Fasel suggest that the emergence of the concept has 'led to a reversal of the burden of justification': if a situation which gives rise to the Responsibility to Protect arises, 'not intervention but inaction must be justified'.[27] Some have even suggested that this amounts to a binding norm, and that 'this procedural obligation is an indispensable component of the … concept'.[28]

However, while these suggestions may have some merit as proposals *de lege ferenda*, they are difficult to square with Security Council practice. It is true that formal meetings of the Council are, as a rule, public,[29] verbatim records are kept and in accordance with Rule 54 of the Provisional Rules of Procedure, these are published. Although not provided for in the Provisional Rules of Procedure, members of the Security Council may make statements in connection with their votes. In the Council, these remarks are called 'statements before the vote' or 'statements after the vote'. However, states are under no formal obligation to do so and often do not.[30] Even where member states do provide an explanation, formal meetings of the Council are essentially 'pro forma affairs: they merely serve to put on record what has already been informally agreed'.[31]

There is no obligation on the Council to provide reasons in the text of the resolution itself. Whereby other key instruments in relation to the development of international law, from international treaties to reports and draft articles published by the International Law Commission, are traditionally accompanied by a 'commentary', which provides elaboration and/or clarification as to the terms of the provisions, there is no comparative practice in relation to Security Council resolutions. While it is sometimes possible to glean some reasons from the

[26] Such a proposal was made by the German Foreign Minister during the General Debate of the General Assembly in 1999. UNGAOR (22 September 1999) UN Doc A/54/PV.8, at 12.
[27] Moeckli and Fasel (n 11) 57.
[28] Ibid.
[29] Rule 48, Provisional Rules of Procedure.
[30] Moeckli and Fasel (n 11) 17.
[31] Moeckli and Fasel (n 11) 20; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) 108: '[t]he net result is that the Security Council meets in public only to adopt resolutions already agreed upon in informal meetings, without giving any insight into the motives underpinning its decisions'.

preamble of a resolution, most preambles only include clauses that members could not find an agreement on and that were therefore removed from the operative part of the resolution.[32] As the International Court of Justice observed in its *Kosovo* opinion, therefore, '[t]he interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption'.[33] However, in practice, the *travaux préparatoires* of a resolution, including for example working papers, drafts of the resolution, and records of the discussions leading up to the resolution, are very rarely made publicly available. Where they are, this is not because of any perceived legal obligation to do so but will invariably be for reasons of political expediency. The Provisional Rules of Procedure fail to provide for a standard procedure or an institutional mechanism to ensure that resolutions are well drafted.[34] Attempting an analysis of why the Council used particular language in a resolution 'would be likely to face enormous hurdles since Council decisions are frequently the fruit of laboured negotiations and reflect nuances and compromises'.[35]

The transparency gap is most apparent in the fact that the bulk of Council business is conducted behind closed doors as 'informal consultations of the whole', or informal consultations of the permanent members only, have become the rule rather than the exception. These meetings are not provided for in the Charter or the Provisional Rules of Procedure.[36] The picture appears to be one of a closed circle. Most often, the original sponsor of a resolution is themselves a permanent member. Any consultation on the substance of a draft resolution which follows will typically only include select (friendly) states and usually only include other permanent members. In almost all cases, consultation is conducted informally and there is no public record.[37]

[32] Moeckli and Fasel (n 11) 17; Wood (n 34) 86-87.
[33] *Kosovo* at para 94.
[34] Moeckli and Fasel (n 11) 16; Michael C Wood, 'The Interpretation of Security Council Resolutions' (1998) 2 *Max Planck Yearbook of United Nations Law* 74, 80.
[35] Loraine Sievers and Sam Daws, *The Procedure of the UN Security Council* (5th edn, Oxford University Press 2015) 589.
[36] Moeckli and Fasel (n 11) 21; Siever and Daws ibid 66-7.
[37] Moeckli and Fasel (n 11) 16; Wood (n 34) 80-82; Sievers and Daws ibid 396. See, further, UN Doc S/PV.6870 (26 November 2012) at 17, during which the representative of South Africa expressed concern 'that resolutions and decisions of the Council are often drafted in small groups and presented as *faits accomplis* to elected members'.

The primary means of ensuring accountability in this context are the annual and special reports that Article 24(3) of the Charter obliges the Council to submit to the General Assembly.[38] According to Article 15(1) of the Charter, 'these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security'. While originally the Council's annual reports were mainly descriptive, there have recently been several efforts to make them more informative and analytical.[39] While the General Assembly can thus review the legality of Council action, it does not have the power to adopt any legally binding sanctions against it upon a report.[40] Formally, therefore, the Security Council is under no general duty to explain the basis on which a determination that a situation constitutes a threat to the peace has been made or the reasons for invoking enforcement measures to maintain international peace and security.[41] Any duties that do exist are either procedural or largely superficial like the reporting requirement to the General Assembly, directed towards states as opposed to the Council,[42] vague and indeterminate,[43] or limited only to their discrete context.[44]

2. Standards: Limitations Imposed by International Law

2.1. *Lex Specialis*

Before identifying specific international legal standards incumbent upon the Council, it is first important to clarify that the Council is, in fact, subject to legal limitations. So much cannot be taken for granted. On the one hand, as the International Court of Justice specified in the

[38] During debates in the Assembly on the *Annual Report*, some Member States have criticised the Security Council for having never submitted special reports to the General Assembly as provided for in Articles 15(1) and 24(3) of the Charter.
[39] Sievers and Daws (n 35) 589.
[40] Sievers and Daws ibid 589.
[41] De Wet (n 31) 134; cf Anna Spain, 'The U.N. Security Council's Duty to Decide' (2010) 4 *Harvard National Security Journal* 320.
[42] UNSC Res 1617 (29 July 2005) UN Doc S/RES/1617, para 4, which introduced a requirement that states 'shall provide to the [Sanctions] Committee a statement of case describing the basis of the proposal' for the listing individuals and entities. See further, UNSC Res 2083 (17 December 2012) UN Doc S/RES/2083, para 11.
[43] UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904, para 14, which directed the Al Qaida Sanctions Committee to make accessible on its website 'narrative summaries of reasons for listing' the respective individuals and entities on its sanctions list.
[44] It is arguable that the statutes of the ICTY and the ICTR, for example, both adopted by resolutions of the Security Council, provide a limited duty to give reasons, in that the statutes provide that judgments must be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended. Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, art 22(2); Statute of the International Criminal Tribunal for the former Yugoslavia, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, art 23(2).

Reparations case, the United Nations is a 'political body, charged with a political task of an important character'.[45] From this, it follows that the principal organ of the organisation, the Security Council, is itself primarily a political institution. The Council is composed of representatives who receive political instructions. In his dissenting opinion in *Namibia,* Judge Schwebel suggests that the 'Security Council is a political organ which acts for political reasons. It may take legal considerations into account but, unlike a court, it is not bound to apply them'.[46] However, on the other hand, as the same Court confirmed in *Condition of Admission of a State to Membership in the United Nations*:

> [t]he political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.[47]

As can be gleaned from the wording of Article 24(1) of the Charter, whereby member states 'confer' to the Council itself considerable power, it should be recalled that the Security Council exercises *delegated power only.* As Judge Jennings suggested in his dissenting opinion in *Lockerbie*:

> [a]l1 discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law and, at the same time, claim to be above the law.[48]

Thomas Franck has pointed out that 'the United Nations is a creation of a treaty and, as such, it exercises authority legitimately only in so far as it deploys powers which the treaty parties

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[45] *Reparations* at 178.
[46] *Nicaragua* (Merits) (dissenting opinion of Judge Schwebel) para 59.
[47] *Admission of a State to the United Nations (Charter, Art 4)* (Advisory Opinion) [1948] ICJ Rep 57, at 64; *Difference Relating to Immunity of Process of a Special Rapporteur of the Commission of Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, at para 66; International Law Commission, 'Draft Articles on the Responsibility of International Organizations, with Commentaries', in Report on the Work of Its Sixty-third Session (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10, art 10(2), confirms that a breach of an 'international obligation … may arise for an international organization towards its members under the rules of the organization'.
[48] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (Preliminary Objections) [1998] dissenting opinion of Judge ad hoc Jennings) ICJ Rep 9, at 110.

have assigned to it'.[49] Implicit in the very idea of delegated power is the assumption that these powers are limited by their own terms. Overstepping these limits means an act is *ultra vires*. As Anne Peters suggests, '[t]his principle is best described as a principle of legality',[50] which suggests that the *ultra vires* doctrine is at home under a legal constitutionalist lens. The Security Council is not the Hobbesian sovereign, for whom 'there can happen no breach of Covenant' between himself and his subjects because there is no such Covenant at all.[51] Bruno Simma suggests that an organisation based on the sovereign equality of its member states would not confer unlimited power to any of its organs.[52] To clarify what these limitations are, the Charter itself is the legal instrument that constitutes the Security Council's power. In the words of Bedjoui, 'it is self-evident that an organ created by a treaty is subjected to that instrument in its very existence, its mission and its power'.[53] Indeed, as the International Criminal Tribunal for the Former Yugoslavia stated in the *Tadić* case, 'neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)'.[54] Whilst it must be acknowledged that the Council is not bound by any acts or decisions of any other organs of the United Nations, and it is not bound by its own previous decisions,[55] there is a strong argument, that it is subject to the terms of the Charter as its constituting treaty. Under the principle of speciality, the UN, and by definition the Security Council as one of its primary organs, can exercise only those powers which have been explicitly or implicitly been entrusted to it by the Charter as its founding document.[56]

2.1.1. Differentiation of Competences

The Council is obliged to respect the differentiation of its competences under Chapter VI and VII respectively. With respect to the pacific settlement of disputes (Chapter VI), the Council only has the power 'investigate any dispute or any situation which might lead to international

[49] Thomas M Franck, 'The Security Council and "Threats to the Peace": Some Remarks on Remarkable Recent Developments' in Rene-Jean Dupuy (ed), *The Development of the Role of the Security Council: Peace-Keeping and Peace-Building* (Martinus Nijhoff 1993) 83.
[50] Peters (n 16) 816.
[51] Martti Koskenniemi, 'The Police in the Temple: Order, Justice and the UN: A Dialectic View' (1995) 6(1) *European Journal of International Law* 325, 326.
[52] See, Bruno Simma, *From Bilateralism to Community Interest in International Law* (Martinus Nijhoff 1994) 270.
[53] *The New World Order and the Security Council: Testing the Legality of its Acts* (Martinus Nijhoff 1994) 14.
[54] *Tadić* at para 28.
[55] Peters (n 16) 815.
[56] *Nuclear Weapons* para 25.

friction or give rise to a dispute'[57] and may recommend appropriate procedures or methods of adjustment, or terms of settlement of the dispute.[58] Crucially, these recommendations have no binding force, according to the wording of Article 25 which refers only to 'decisions'. In addition, any settlement under Chapter VI should be made in accordance with international law, by virtue of Article 24(2) read in conjunction with Article 1(1).[59] It is arguable, therefore, that if the Council tried to force through a settlement recommended under Chapter VI by invoking its Chapter VII powers, this would constitute a breach of the obligation to respect the differentiation of its powers.[60] The Council must also respect the division of powers among the different organs of the United Nations.[61] According to the *Certain Expenses* Advisory Opinion, if 'an action was taken by the wrong organ', it would be 'irregular as a matter of that internal structure'.[62] Thus, any action 'initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter proscribed' may be *ultra vires.*[63]

As a corollary, Council decisions must have a clear legal basis within the Charter. In other words, coercive enforcement measures must clearly be covered by Chapter VII. It is accepted though that the Council possesses not only these specific powers laid down in the Charter, but also the general implied power to maintain international peace and security.[64] As the Court stated in *Reparations*, the United Nations 'must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon by necessary implication as being essential for the performance of its duties'.[65] There is no reason why the doctrine of 'implied

[57] UN Charter (1945) art 34.
[58] UN Charter (1945), arts 36(1) and 38.
[59] Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (Oxford University Press 2011) 67.
[60] Ibid 67-68.
[61] Ibid 68; Peters (n 16) 816.
[62] *Certain Expenses* 168. See further, *Certain Expenses* (dissenting opinion of Judge Winiarski) at 230: 'The Charter, a multilateral treaty which was the result of prolonged and laborious negotiations, carefully created organs and determined their competence and means of action'.
[63] Ibid. By means of a practical example, under Article 17 of the Charter, the 'General Assembly shall consider and approve the budget of the Organization'. This is an exclusive competence, and the principle of 'institutional balance' would dictate that the Security Council should not, by the letter of the Charter, take on this role in any circumstance.
[64] *Namibia* para 110.
[65] *Reparations* para 182,

powers' does not extend to organs of the organisation such as the Security Council.[66] This position is also supported generally in scholarship.[67]

However, there are at least four limitations on the use of implied powers in international institutional law generally proposed in the literature. The first is that implied powers may not change the distributions of functions within an organisation. A second limitation is that recourse to implied powers must be necessary for the institution to perfect its functions. As the International Court of Justice confirmed in the *Reparations* case, 'under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties'.[68] A third limitation relates to the existence of any explicit powers in the area concerned. According to Judge Moereno Quintana, in his dissenting opinion in the *Certain Expenses* case, implied powers 'are not to be invoked when explicit powers provide expressly for the eventualities under consideration'.[69] This conclusion follows from the basic canons of treaty interpretation, such as those contained in Article 31 of the Vienna Convention on the Law of Treaties.[70] It is also a general principle of interpretation that 'special law repeals general laws' (*lex specialis derogat legi generali).* In other words, a principle according to which a rule of *lex specialis* is deemed to apply notwithstanding any implied, or 'general' rule.[71]

Finally, and perhaps most controversially, the use of implied powers may not violate fundamental rules and principles of international law. To Gill, the doctrine of implied powers cannot provide a 'blank cheque' to take measures which would violate fundamental principles and rules of international law, 'even if these are not specifically referred to in Chapter I or in other provisions of the Charter'.[72] The International Court illustrated this in its *Namibia*

[66] See, eg, *Effect of Awards of Compensation made by the U N Administrative Tribunal* (Advisory Opinion) [1954] ICJ 47, at 56, in which the ICJ identified an implied powers of the General Assembly to establish an administrative tribunal.
[67] Peters (n 16) 781-782; Kenneth Manusama, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality* (Martinus Nijhoff 2006) 283.
[68] *Reparations* at 182.
[69] *Certain Expenses* at 245.
[70] Vienna Convention on the Law of Treaties (1969), art 31(1): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.
[71] Terry Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter' (1995) 26 *Netherlands Yearbook of International Law* 3371; Niels M Blokker, *International Institutional Law* (3rd edn, Martinus Nijhoff 1995) 548-549.
[72] Gill (n 71) 71.

Opinion. While acknowledging the status of the Council's implied powers, these did not apply 'to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia'.[73] In short, to Gill 'the Council is no more allowed to do anything which is not specifically prohibited on the basis of its general powers than it is on the basis of specific authority granted to it elsewhere in the Charter - particularly if this would violate fundamental human rights or humanitarian norms'.[74]

The Council is obliged to comply with the procedural rules under the Charter, not least those referring to the right of the veto and requisite majorities.[75] The Security Council's practice in this regard is quite sporadic. It does not appear, for example, that the Council feels obliged to state explicitly that it is 'acting under Chapter VII', or, when taken specific enforcement measures, whether it is acting under Article 41 or 42 respectively. It is accepted though, that in order to trigger Chapter VII, the Council must at least make a determination that a situation constitutes a threat to international peace and security.[76] The status of Article 39, as a necessary pre-condition, or 'gateway' to enforcement measure can be read into its position at the beginning of Chapter VII.[77] This interpretation enjoys widespread support in academic commentary and among states, including permanent members of the Council.[78] The European Court of Human Rights has also referred to the 'necessary identification' of a threat to the peace as 'the first step in the application of Chapter VII'.[79] The Council also clearly subjectively has a sense of this obligation. All of the resolutions throughout its history which have authorised the use of force, while not necessary citing Article 39 explicitly, have included a reference to the terms of the provision itself; that is, a determination that the situation constitutes either a threat to the peace a breach of the peace or an act of aggression.

2.1.2. The Scope of Article 39

[73] *Namibia* at para 122.
[74] Gill (n 71) 106. International humanitarian law is not considered as a substantive limit as it is deemed outside the scope of thesis. The Council can only be 'held accountable' for a breach of international humanitarian law if the implementation of a Council authorisation to use force triggers obligations incumbent upon states. It thus relates to the implementation of decisions as opposed to the decision-making process itself.
[75] Tzanakopoulos, *Disobeying the Security Council* (n 59) 68.
[76] Ibid 60-64; De Wet (n 31) 133-138
[77] Tzanakopoulos (n 9) 60.
[78] See, eg, UN Doc S/PV.5474 (22 June 2006) at 17 (representative of Russian Federation): 'I would like to stress that employing Chapter VII is justified only in situations where the Security Council determines that there is a threat to peace'.
[79] *Behrami* at para 128.

The question remains, however, as to whether the terms of Article 39 provide any substantive limitation,[80] or if the provision provides only a procedural hurdle.[81] From one perspective, the determination of what constitutes a threat to the peace is 'completely within the discretion of the Security Council'.[82] However, it is a general rule of treaty interpretation that the Council is obliged to conform with the ordinary meaning to be given to the terms of its constituent treaty, the Charter, based on its object and purpose.[83] It is curious, therefore, that only a few authors have applied a textual approach to Article 39 to clarify the meaning and scope of its terms.[84] The terms themselves are extremely broad. In his dissenting opinion in the *Namibia* case, Judge Fitzmaurice expressed his discomfort that 'any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one'.[85] However, while he accepted a wide discretion for the Council to determine what constitutes a threat to international peace and security, this was met with the proviso that 'the threat said to be involved is not a mere figment or pretext'.[86]

The obligation of establishing the existence of a threat to the peace is, to Antonios Tzanakopoulos, 'a substantial one'. He states that the Council has a 'discretionary power to select any of the possible alternative meanings of the term 'threat to peace'' as long as these remain within, 'but do not exceed, the interpretative radius of the provision'.[87] In the words of Ervin Hexner:

> The interpretative radius of a provision signifies the range of possible meanings attributable to it. Even the widest interpretative range must permit a determination of whether a specified meaning is covered or not. The authority of an organ to apply the provision extends necessarily to the selection of any of the possible meanings *within* the interpretative range.[88]

[80] See, generally, De Wet (n 31) 133-77; Tzanakopoulos, *Disobeying the Security Council* (n 59) 60-64; Talmon, 'World Legislator' (n 10) 184-185.
[81] The Council is also obviously under an obligation to comply with the voting rules, for example the requirement that decisions receive the affirmative vote of nine out of the fifteen members, including the affirmative vote (or abstention) of all permanent members. This was explicitly stated as a limit on Council decision-making in *Namibia* at 20.
[82] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Praeger 1950) 727.
[83] VCLT (1969), art 31(1).
[84] See, for a notable exception, De Wet (n 31) 138-149.
[85] *Namibia* (dissenting opinion of Judge Fitzmaurice) at para 116.
[86] Ibid at para 112.
[87] Tzanakopoulos (n 9) 62; Peters (n 16) 817.
[88] Ervin P Hexner, 'Teleological Interpretation of Basic Instruments of Public International Organizations' in Salo Engel (ed), *Law, State, and International Legal Order: Essays in Honor of Hans Kelsen* (University of Tennessee Press 1964) 119 (cited in Tzanakopoulos, *Disobeying the Security Council* (n 59) 62).

Ian Johnstone takes a similar position in suggesting that 'any language, including the language of the law, can plausibly be stretched only so far'.[89]

In short, a determination that a situation constitutes a threat to the peace might be said to be at the least a procedural obligation on the part of the Council. It is certainly a practice that the Council has followed in its resolutions to date. However, it is arguable that this practice is more a convention than a binding legal rule. This is supported by the fact that the Council, through its own practice, has developed its own new and novel ways to take enforcement measures, especially in the realm of the use of force. In contemporary practice, the Council authorises member states to 'use all necessary measures' or 'all necessary means'. It is submitted that the object and purpose of a resolution was clearly the invocation of enforcement measures, but the resolution itself did not include reference to a threat to the peace, the resolution would still be valid. However, considering the elasticity of the term itself, there is no reason for the Council *not* to make such a determination in order to trigger its Chapter VII competence. Article 39 provides almost no substantive limitation on Council decision-making. As a final word, even if it was accepted that the term 'threat to the peace' carried an objectively (and juridically) identifiable meaning, and this constituted a substantive constraint on the Council, just a constraint would bear no difference on a practical level from that imposed by the Purposes and Principles of the Charter. That is, if an Article 39 determination was deemed arbitrary, this is just another way of saying that the decision is not in furtherance of the Charter's primary purposes, the maintenance of international peace and security. This is supported by the fact that mistakes of fact, even if those mistakes relate to the existence of the threat itself, do not as such relieve members from their obligation to implement a binding Council decision.[90]

2.1.3. The Purposes and Principles of the United Nations

Article 24(2) stipulates expressly that 'in discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations'.[91] In *Tadic,* the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia suggested

[89] Ian Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing down the Deliberative Deficit' (2008) 102(2) *American Journal of International Law* 275, 280.
[90] Peters (n 16) 817.
[91] Article 24(2), UN Charter (1945).

that '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.'[92] Judge Weeramantry, in his dissenting opinion in Lockerbie, submitted that:

> Article 24 itself offers us an immediate signpost to such a circumscribing boundary when it provides in Article 24(2) that the Security Council in discharging its duties under Article 24(1), 'shall act in accordance with the Purposes and Principles of the United Nations'. The duty is imperative and the limits are categorically stated.[93]

There is so much judicial support for the proposition that the purposes and principles limit the Security Council's discretion that it would be difficult to suggest otherwise. In the *Namibia* case, for example, the International Court of Justice held that decisions adopted 'in conformity with the Purposes and Principles of the Charter' are binding on all MS of the UN.[94] The implication is, surely, that the reversal would also be true: decisions that did not conform to the purposes and principles would not be binding.

During the San Francisco negotiations, Norway proposed two amendments to the Charter specifically 'as a restraint on the Security Council'.[95] The first was to remove the word 'principle' from the title of Article 24 which originally read 'principle functions and powers'. The argument was that the functions and power of the Council should be limited to those stated in the Charter. This amendment succeeded. The second, which did not, proposed that Article 24(2) should state that the Council should act not only in accordance with the principles and purposes but also in accordance with 'the provisions of the Charter' generally.[96]

The phrase is a reference to Chapter I of the Charter which consists of Article 1 stating the 'purposes' and Article 2, stating the 'principles' of the United Nations. Under Article 1(1), the first purpose of the United Nations is:

> …to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the

[92] *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) at para 29.
[93] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (Provisional Measures) [1992] ICJ Rep 114 (Dissenting Opinion of Judge Weeramantry) at 171.
[94] *Namibia* at paras 115-116.
[95] Peters (n 16) 813.
[96] Peters (n 16) 813.

> peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

There are a number of elements to this provision that it is necessary to unpack. First, clearly, the reference to 'the principles of justice and international law' is limited to where the Security Council is acting under Chapter VI. The implication is that it would appear that, when acting under Chapter VII, the Council is permitted to derogate from the existing rules of international law.[97] Indeed, this omission is no coincidence, but instead represents a conscious decision on the part of the drafters. In San Francisco, several attempts were made to explicitly require Chapter VII measures to be taken in accordance with general international law, but these were rejected.[98]

In addition to the primary goal of peace and security, the purposes also include respect for the self-determination of peoples,[99] the solving of socio-economic and humanitarian problems and the promotion of human rights.[100] However, as the International Court of Justice confirmed in the *Certain Expenses* case:

> The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition. These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited.[101]

Considering the hierarchical superiority of this primary purpose of the UN, it is difficult to conclude that the purposes of the organisation provide any substantive limitation, however.[102] For example, while one could disagree on the facts with the Council's determination of a threat to the peace, it is practically very difficult to conceive a situation in which a determination of the Council explicitly contravenes the Purposes and Principles of the Charter and is thus invalid

[97] Judith G Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2000) 297; Bernd Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?' (1999) 10(3) *European Journal of International Law* 517, 544-545; Gabriel H Oosthuizen, 'Playing the Devil's Advocate: The United Nations Security Council is Unbound by Law' (1999) 12 *Leiden Journal of International Law* 521, 552.
[98] Martenczuk ibid 545.
[99] UN Charter (1945), art 1(2).
[100] UN Charter (1945), art 1(3).
[101] *Certain Expenses*, at 168.
[102] Finn Seyersted, 'United Nations Forces – Some Legal Problems' (1961) 37 *British Yearbook of International Law* 351, 458-59; Peters (n 16) 812: 'the 'purposes' as enumerated in Art. 1 are so sweeping and abstract that [it] is hardly conceivable that the Council taken any decision which cannot be said to further them.

on the grounds that the Council is acting *ultra vires.* The Purposes and Principles of the Charter play at best only a restrictive role, and in practice, this restriction applies only in regard to concrete measures taken by the Council subsequent to such a determination.[103] However, it is submitted that, by virtue of its position at the head of the purposes of the UN, the maintenance of international peace and security is the most important and, as a result, 'all other objectives can be related to this purpose'.[104] While a decision that manifestly violated one of the principles of the organisation would clearly be *ultra vires,* this would seem to be only a hypothetical proposition. The Council will, in practice, always frame its decisions so as to be in line with Article 1(1) and, due to the fact that the specific formula of invoking Chapter VII requires a determination that a situation constitutes a threat to the peace, all Chapter VII decisions will *de facto* be said to be furthering the purposes, as opposed to being in conflict. The purposes are, therefore, so broad that almost any decision could be said to further them.[105] Martenczuk asserts that 'the purposes and principles of the United Nations as laid down in Articles 1 and 2 of the Charter are extremely vague and general in nature' and that 'the standard of review of the Security Council resolutions cannot be sought in the purposes and principles of the United Nations'.[106]

Article 2 provides that the 'principles' shall bind the organisation and its members.[107] Article 2(2) of the Charter states, 'All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter'. At first reading, the demand for good faith appears to refer only to member states.[108] However, it is arguable that this demand applies to members not only while they are acting in their individual capacities but also while they are acting through the Security Council.[109] The crucial point though is that any breach of this responsibility would fall on individual states, and not on the Council per se. The obligation to act in good faith is imposed only on the members, not on the United Nations itself, and can

[103] Erika de Wet, *The Chapter VII Powers of the UN Security Council* (Hart Publishing 2004) 134-44; Yorum Dinstein, *War, Aggression and Self Defence* (Cambridge University Press 2017) 310.
[104] Peters (n 16) 812.
[105] Ibid 812.
[106]Martenczuk (n 97) 537. See, also, Oosthuizen (n 97) 562.
[107] Article 2, UN Charter (1945).
[108] Peters (n 16); Oosthuizen (n 97) 559-560.
[109] *Conditions of Admission of a State to membership in the United Nations* (Advisory Opinion) [1948] ICJ Rep 57 (dissenting opinion of Judges Basdevant, Winiarski, McNair and Read) para 20, recognising that the principle of good faith represents a limitation to the members' discretion under any circumstance, including the occasions when they are taking part in the works of UN organs, such as the Security Council.

therefore not be directly employed as a legal limit on Council decisions.[110] This is in contradistinction to the general opening sentence of Article 2 and other provisions of the same Article which address both the United Nations and its member states.

2.1.3. Article 25: Restrictive or Expansive Interpretation?

According to the wording of Article 25, members agree to carry out the decisions of the Council 'in accordance with the present Charter'. There are perhaps four possible interpretations of the wording of Article 25, and this has been the subject of some controversy.[111] One might read the provision as simply *describing* the nature of the obligation. That is, reiterating that states are obliged to carry out Council decisions and that the source of this obligation derives from the Charter itself. Alvarez, for example, relies upon the drafting history of the Charter to conclude that Article 25 is merely a cross-reference to the fact that decisions taken under Chapter VII are binding and not merely recommendatory.[112] Alternatively, the final stanza may be *instructive.* It may speak to the manner in which states should carry the decisions of the Charter; in other words, states are obliged to implement Council decisions but in doing so they must not violate some other obligation under the Charter. Finally, one might take a more *normative* reading to suggest that the wording pre-sets a limit on the type of Council decisions which are binding and that only decisions taken in accordance with the Charter (*intra vires* decisions) actually acquire binding force. According to Orakhelashvili, for example, Article 25 makes the binding force of the Council's acts conditional upon such compliance'.[113] As a corollary, he states that Security Council decisions are not binding 'if they are incompatible with the Charter. In such cases, Article 25 admits that states may refuse compliance'.[114] It is, indeed, a fundamental rule of interpretation that no phrases or words are presumed to be useless in legal texts.

In the *Namibia* advisory opinion, the International Court of Justice concluded that:

> The Court has therefore reached the conclusion that the decisions made by the Security Council … were adopted in conformity with the purposes and principles

[110] Peters (n 16) 813.
[111] Tzanakopoulos, *Disobeying the Security Council* (n 59) 58.
[112] José E Alvarez, 'The Security Council's War on Terrorism: Problems and Policy Options' in Erika de Wet and André Nollkaemper (eds), *Review of the Security Council by Member States* (Intersentia 2003) 119
[113] Alexander Orakhelashvili, *Collective Security* (Oxford University Press 2011) 76.
[114] Ibid 85.

> of the Charter and in accordance with its Articles 24 and 25. The decisions are consequently binding on al1 States Members of the United Nations, which are thus under obligation to accept and carry them out.[115]

The implication here is clearly that if the particular decisions of the Council in question were deemed not to conform to the purposes and principles of the Charter, and/or in accordance with Articles 24 and 25, then member states would be relieved of their duty to carry them out. This has been described as a particularly 'radical' interpretation that would lead to an 'absurd result by erasing the difference between binding decision and recommendation'.[116] It has also been argued that Article 25 of the Charter only applies to enforcement measures adopted under Chapter VII. This is, however, not a strong argument. After all, the Article is placed, not in Chapter VII which deals only with enforcement measures but immediately after Article 24 which deals generally with the functions and powers of the Council.[117]

A fourth possible interpretation suggests that only decisions vested by other Charter provisions with binding force must be carried out, as opposed to those that are merely recommendatory. Judge Fitzmaurice's dissenting opinion in *Namibia* espouses this view. He stateed that,:'If, under the relevant chapter or article of the Charter, the decision is not binding, Article 25 cannot make it so. If the effect of that Article were automatically to make all decisions of the Security Council binding, then the words 'in accordance with the present Charter' would be quite superfluous'.[118]

A final reason to be sceptical relates to the wording of Article 2(5), and the phrase in 'accordance with the present Charter, clearly refers to the Council, and not to the members. It is submitted nevertheless, that the meaning of the stanza is subject to the same ambiguities as in Article 25. Interpreting Article 25 as a legal limit creates a contradiction between that provision and Article 24(2) which lists only the 'Purposes and Principles' as a legal limit on the Council.[119]

2.1.4. The Potentially Limiting Scope of Article 103

[115] *Namibia* at para 115.
[116] Peters (n 16) 807-808.
[117] *Namibia* at para 113.
[118] *Namibia* (dissenting opinion of Judge Fitzmaurice) at para 113.
[119] Peters (n 16) 808.

There is also controversy surrounding the impact of Article 103 of the Charter. The International Court of Justice has declared that decisions of the Security Council fall within the scope of obligations under the Charter.[120] The issue is particularly apparent when one considers the possibility of the adoption by the Council of a decision which may be seen as conflicting with an existing international legal obligation binding upon member states. Certain scholars have noted that Article 103 creates an inherent limit on Security Council action to the extent that a Council resolution must be compatible with the Charter in the first place before Article 103 could provide its primacy.[121] According to this reasoning, the provision cannot be used to make a resolution which is contrary to the Charter prevail over other rules of international law, it 'cannot be invoked as giving the United Nations an overriding authority which would be inconsistent with the provisions of the Charter itself.'[122]

It is debated, however, as to whether Charter obligations prevail over obligations arising from other sources of international law, most obviously customary international law. It should be acknowledged that scholarly views are split on this issue.[123] Koskenniemi suggests that the 'prevailing opinion' is to follow the more extensive approach.[124] Judge Bedjaoui appeared to adopt this approach in the *Lockerbie* case. He stated that Article 103 did 'not cover such rights as may have other than conventional sources and be derived from general international law.[125] Four observations support this approach. First, a formula according to which all other commitments, including those arising under customary law, were to be superseded by the Charter, was ultimately omitted from the final text.[126] Second, in the absence of this amendment, a textual reading is unambiguous: 'international agreements' do not cover custom. Third, as *lex generalis*, customary law normally yields to treaties (and treaties establishing international organisations like the Charter) as *lex specialis.* Finally, and perhaps most importantly, the practice of the Security Council has continuously been grounded on an understanding that Security Council resolutions override conflicting customary law. As the

[120] *Lockerbie* at para 13; see also *Nicaragua* at para 440.
[121] See, eg, Alaxander Orakhelashvili, 'The Acts of the Security Council: Meaning and Standards of Review' (2007) 11 Max Planck Yearbook of United Nations Law 143, 149-151.
[122] Wilfried Jenks, 'The Conflict of Law-Making Treaties' (1951) 30 British Yearbook of International Law 439, 439.
[123] cf Orakhelashvili (n 121) 149-151.
[124] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission' (Finalised by Martti Koskenniemi) (13 April 2006) UN Doc A/CN.4/L.682, at para 345.
[125] *Lockerbie* case (dissenting opinion of Judge Bedjaoui) at para 47.
[126] International Law Commission, 'Fragmentation of International Law' (n 124) at para 244.

Security Council is a creation of the Charter, it would be odd if the prevailing effect of Security Council resolutions would not extend to the Charter itself.

Some scholars have sought to explain this omission with reference to *jus cogens.*[127] *Jus cogens* norms are peremptory norms of international law and by definition, they cannot be derogated from.[128] They are overriding norms of the international legal order and they supersede all other norms. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*.[129] It cannot be said that Article 53 of the Vienna Convention on the Law of Treaties is itself a treaty provision which must give way to Article 103.[130] Any Security Council decision in conflict with a norm of *jus cogens* must necessarily be without effect. The proposition that obligations arising under the Charter are not by Article 103 deemed hierarchically superior to norms of peremptory status seems to be accepted. Judge Lauterpacht, in his Separate Opinion in the *Genocide* case, agreed that Article 103 cannot, 'as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens'*. This reasoning is supported by the ILA Report, which states that, although Article 103 establishes the primacy of Charter obligations, member states cannot be required to breach peremptory norms of international law in that context.[131] This position is supported by Orakhelashvili, who suggests that 'the obligation to comply with the Council's resolutions is conditional upon the Council's compliance with the Charter principles: Article 103 cannot make a resolution which is unlawful under the Charter prevail over other legal norms'.[132]

Of course, in the absence of Article 43 arrangements the Security Council doesn't *bind* members to participate in enforcement measures but instead 'authorises' states to do. However, these authorisations are stronger than mere hortatory recommendations. Article 103 should be

[127] See, eg, Geoffrey R Watson, 'Constitutionalism, Judicial Review and the World Court' (1993) 34 *Harvard International Law Journal* 1, 36-37.
[128] See, Article 53 and Article 64, Vienna Convention of the Law of Treaties (1969).
[129] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Separate Opinion of Judge Lauterpacht) [1993] ICJ Rep 1993, at para 440, see also *Kadi*, the Court, having decided the case of the basis of jus cogens, did not treat Article 103 as upsetting the outcome.
[130] Peters (n 16) 852.
[131] International Law Association, 'Report on the Accountability of International Organisations' (Berlin Conference 2004) at 19.
[132] Alexander Orakhelashvili, *Collective Security* (Oxford University Press 2011 69.

read to incorporate all Chapter VII decisions.[133] In addition, although Article 103 only refers to 'obligations' under the Charter prevailing over 'obligations' under other treaties, the same principle must also apply to 'rights' arising under treaties. If a treaty obligation is suspended by a binding Security Council decision, by logical extension any rights stemming from those obligations will be suspended as well.[134] Finally, it is important to clarify the relationship between Article 103 and the general the general rule of conflict of norms stipulated in the VCLT. Article 30(2) states that '[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail'. This would ordinarily imply that subsequent treaties concerning the same subject matter would supersede and, in a sense, repeal, specific sections of the Charter. However, the VCLT stipulates itself that these rules are 'without prejudice to the fact that, in the event of a conflict between obligations under the Charter of the United Nations and obligations under a treaty, the obligations under the Charter shall prevail'.[135] The Charter's supremacy clause can, therefore, be read as a *lex specialis* to the general rules of the Vienna Convention.[136]

2.2. Lex Generalis

The suggestion that the Council is bound by general international law – that is, sources external to the Charter – is much more controversial. In an early study, Finn Seyersted had insisted that any limitations on the power of the United Nations and its organs 'are internal, constitutional matters, which do not, in principle, affect the external capacity of the organization under international law'.[137] As the United Nations only exists by virtue of its status as a constitutive treaty, nothing *prima facie* precludes their organs from acting in disregard of ordinary norms of international law, provided and to the extent that the constituent instrument evidences the intention of member states to enable the organisation to act in such a manner while exercising its functions. Some have argued that the Charter, far from precluding this eventuality, actually opens the door to the Security Council disregarding general international law when acting under Chapter. Indeed, pursuant to Article 1(1), as one of the purposes of the UN, any 'international disputes or situations that might lead to a breach of the peace' should be settled 'in conformity with the principles of justice and international law'. Kelsen had already

[133] Peters (n 16) 851.
[134] De Wet (n 31) 183.
[135] Article 30(6), Vienna Convention of the Law of Treaties (1969).
[136] Peters (n 16) 850.
[137] Seyersted (n 102) 460.

suggested that 'justice and international law' are only mentioned in the context of the peaceful settlement of disputes but not in the context of collective measures of the Council under Chapter VII. He concludes that, as a result, the Council is not bound to comply with general international law when acting to maintain or restore international peace and security.[138]

General international law combines two sources of law found in Article 38 of the Statute of the International Court of Justice: customary international law and general principles.[139] Customary international law emerges where there is a general and consistent state practice that states follow from a sense of legal obligation.[140] It is generally accepted that international organisations are bound by customary international law, but scholarly opinion is not unanimous. Klabbers, for example, expresses some scepticism in that, 'if one is to become bound by a customary rule, it is only fair that one is also in a position to contribute to its formation – yet with international organizations this possibility is practically ruled out on topics other than those falling within the competences of the organization.[141]

Exactly which rules fit into the 'general principles' category is not clear-cut. As traditionally conceived, general principles include those legal principles 'derived from, and evidenced by, the consistent provisions of various municipal legal systems … which can be validly transposed into international law'.[142] A single sentence in the International Court of Justice's 1980 WHO-Egypt advisory opinion supplies the foundation for many analyses of the obligations of the United Nations under general international law.[143] The sentence reads: 'international organisations are subjects of international law and, as such, are bound by any obligations incumbent under them under general rules of international law'.[144] August Reinisch, for example, points to an obligation incumbent upon the United Nations to observe customary law,

[138] Kelsen (n 82) 294-295.
[139] Kristina Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57(2) *Harvard International Law Journal* 325, 331.
[140] Statute of the International Court of Justice (1945), art 38(1)(b); International Law Commission, 'Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee' (14 July 2015) UN Doc A/CN.4/L.869, at 1: 'To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)'.
[141] Jan Klabbers, 'The Sources of International Organizations Law: Reflections on Accountability' in Samantha Besson and Jean D'Aspremont (eds) *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017).
[142] Daugirdas (n 139) 331.
[143] Ibid 331.
[144] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, at para 90.

which he derives from 'more general reflections concerning the status of the UN as an organization enjoying legal personality'.[145] According to the same author, it 'has been forcefully stressed that the Security Council is 'subject to' international law because the UN itself is a 'subject of' international law, and this reasoning may be applied more generally to other international organizations'.[146]

However, even in accepting the general sentiment of the Court's conclusion, there is still some ambiguity. If the United Nations is bound by 'any obligations incumbent upon them', it is not clear exactly which rules these refer to. The phrase 'general rules of international law' also complicates matters. As Daugirdas shows, the Court has not used this term consistently.[147] Klabbers has argued that the advisory opinion indicates that only a subset of general international law binds the United Nations and its organs. In his view, these include rules on the 'making, application, and enforcement' of international law; that is, primary rules such as rules about treaty law or responsibility.[148] By contrast, 'secondary rules, loosely defined as rules related to the making, application, and enforcement of primary rules, are more difficult to capture in terms of customary international law'.[149]

In short, 'the answers that scholars have given to the question of whether general international law binds [international organisations] include: maybe, sometimes, and always'.[150] As the answer is rarely 'none', this necessitates an analysis of the argument traditionally put forward, in order to identify any potential substantial limitations on Security Council decision-making. According to some commentators, the *lex generalis* includes both *jus cogens*, but also elements of the *jus dispositivum*, including human rights obligations.[151] In this section, each will be addressed in turn.

2.2.1. *Jus Cogens*

[145] August Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 *Global Governance* 131, 136.
[146] Ibid.
[147] Daugirdas (n 139) 33: 'Sometimes the term refers to customary international law and general principles. Other times the term refers to norms that are mandatory and binding without exception. Still other times it is used as a synonym for customary international law'.
[148] Klabbers, 'The Sources of International Organizations Law' (n 141) 999.
[149] Ibid.
[150] Daugirdas (n 139) 335.
[151] See, eg, Tzanakopoulos, *Disobeying the Security Council* (n 59); De Wet (n 31).

Manusama maintains that *jus cogens* 'norms are in particular applicable to the United Nations and the Security Council as part of its international legal personality and international rights and duties'.[152] Indeed, there is essentially a unanimous scholarly agreement that Council decisions must respect *jus cogens.*[153] The notion of *jus cogens* – the peremptory norms of international law – relates to those norms which are 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'.[154] Peremptory norms exist to protect the values and interests that are fundamentally important to the international community as a whole. This phenomenon is due to the link between *jus cogens* and morality, which is the most usual and frequent explanation of a norm's peremptory character.[155]

The value of the suggestion that the concept of *jus cogens* provides a substantive limit on the Security Council is self-explanatory. First, according to Reinisch, 'the Council must respect peremptory norms of international law because the core values protected by the concept of *jus cogens* are non-derogable in the sense of *jus dispositivum*'.[156] Therefore, while it may be possible to argue that certain other rules of general international law are incumbent upon the Council in certain circumstances, it will always be open to members of the Security Council to launch some other argument to show that the breach is covered by an exception to that rule. The illegality emanating from the breach of jus cogens is, conversely, immediate and objective, which means that the basis of the illegality is the breach of a rule as such, regardless of the attitude of specific actors. This is so because, as Jennings suggests, breaches of peremptory norms constitute objective wrongs, which offend the interests of the international community as a whole. The consequent nullity is not qualified by subsequent attitudes.[157] The result is that

[152] Kenneth Manusama, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality* (Martinus Nijhoff 2006) 27; David Schweigman, *Authority of the Security Council under Chapter VII: Legal Limits and the Role of the International Court of Justice* (Martinus Nijhoff 2001) 177*:* 'This non-derogatory character means that all subjects of international law, including the Security Council, have to abide by them'.
[153] Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 *European Journal of International Law* 59; De Wet (n 31) 187-191; Dapo Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46(2) *International and Comparative Law Quarterly* 309, 332-333; Tzanakopoulos, *Disobeying the Security Council* (n 59) 70-72.
[154] Vienna Convention on the Law of Treaties (1969), art 53.
[155] Orakhelashvili, 'The Impact of Peremptory Norms' (n 153) 62.
[156] August Reinisch, Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions (2001) 95 *American Journal of International Law* (2001) 859.
[157] Robert Jennings, 'Nullity and Effectiveness in International Law*',* in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (Stevens 1965) 74.

the applicability of peremptory norms to a given situation – or the legality of a given fact, or action – would not be prejudiced by how the Security Council treats that act or situation.[158]

Before delving into the applicability of *jus cogens* norms at the level of international organisations, it is first necessary to engage with the critique of *jus cogens* at the meta-level of international law. The strongest critique is that the concept of *jus cogens* provides an uncomfortable bed-fellow to a conventional, positivist conception of how international law is formed and develops.[159] Charlesworth and Chinkin suggest that the concept of *jus cogens has* 'an explicitly promotional and aspirational character'.[160] Even if we accept that the notion of *jus cogens* does instil binding obligations, however, there are specific issues in relation to their applicability to Security Council decision-making.

The first issue to consider is whether applying *jus cogens* as a limit on the Security Council removes the concept from its natural heritage, and thus constitutes an over-extension of the notion of *jus cogens.* Martenczuk, for example, suggests that *jus cogens* 'is essentially a concept from the law of international treaties that cannot easily be transplanted into the law of the United Nations'.[161] Article 53 of the Vienna Convention on the Law of Treaties, after all, reads: 'a *treaty* is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. It is true that responsibility falls, first and foremost, on states to bring their mutual relations in conformity with *jus cogens* norms. However, this argument is surely not insurmountable. If peremptory norms permit no derogation, it follows that States should not be permitted to delegate out of their own peremptory obligations.[162] In addition, De Wet argues that as the Charter is itself a treaty, where the implementation of a binding Council decision would result in a violation of a *jus cogens* norm, 'member states would be relieved

[158] Orakhelashvili, 'Impact of Peremptory Norms' (n 153) 77-78.
[159] Gordon A Christenson, 'Jus Cogens: Guarding Interests Fundamental to International Society' (1987) 28 *Vancouver Journal of International Law* 585, 594: '*Jus cogens* elicits concern in that it … compels revision in the social contract metaphor among nations as the theoretical positive law basis for the international community'; cf Ulf Linderfalk, 'The Source of *Jus Cogens* Obligations – How Legal Positivism Copes with Peremptory International Law' (2013) 82 *Nordic Journal of International Law* 369.
[160] Hilary Charlesworth and Christine Chinkin, 'The Gender of *jus cogens'* (1993) 15 *Human Rights Quarterly* 63, 75. See further, Gordon A Christenson, 'Jus Cogens: Guarding Interests Fundamental to International Society' (1987) 28 *Vancouver Journal of International Law* 585, 648: '*Jus cogens* is invoked as pure aspiration, as if to be hopeful of a better system of restraint on the positive law-making power of sovereign States, but knowing full well the human condition;' Theodor Meron: 'Is there a Hierarchy within the Body of International Rules?' in Joseph Weiler and Antonio Cassese (eds), *Change and Stability in International Law-Making* (Walter de Gruyter 1988) 92, 94: 'on a practical level … the usefulness of the concept is mostly potential'.
[161] Martenczuk (n 97) 546.
[162] Orakhelashvili (n 153) 68; Erika De Wet and André Nollkaemper, 'Review of Security Council Decisions by National Courts', (2002) 45 *German Yearbook of International Law* 166, 181-182.

from giving effect to the obligation in question'.[163] The Vienna Convention is also clear that it applies to the constituent instruments of international organisations.[164] From this, it would follow that jus *cogens* cannot be overridden by the Article 103 supremacy clause. As De Wet notes, the stakes are extremely high: if the Charter can override the peremptory norms of *jus cogens,* then 'states could instrumentalise the collective security system in order to engage in slavery, apartheid or even genocide, provided that the requisite majority in the Security Council can be secured'.[165]

The second issue is one of temporality. Since the concept of *jus cogens* was only introduced in the Vienna Convention in 1969, it might be arguable that the Security Council, exercising powers conferred upon it by the Charter, would not be bound by these peremptory norms which were not in effect *at the time of its conclusion*.[166] However, such a position is not sustainable for three reasons. First, Article 64 of the Vienna Convention provides that 'if a new peremptory norm of international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'. Second, the conferral of powers to the Council should be regarded as an 'ongoing interaction', as opposed to a one-time transaction.[167] Third, the notion of *jus cogens* exists as an underlying principle of customary international law, which does apply to the Charter.[168] In order for the Charter to remain in harmony with both the peremptory norms that existed at the time of its entry into force and the peremptory norms that emerged subsequently, it must be interpreted as not being in conflict with them; otherwise, one would be forced to consider it void.

The third issue is more substantial in nature. There is considerable debate as to whether a restrictive or an expansive interpretation is more appropriate. It has certainly historically been assumed that the list of norms which can be ascribed a peremptory status is very narrow indeed.[169] According to the International Law Commission's Commentary to the Articles on

[163] De Wet (n 31) 188. See, further, Article 26 ARIO.
[164] Vienna Convention on the Law of Treaties (1969), art 5.
[165] De Wet (n) 189-190; Tzanakopoulos, *Disobeying the Security Council* (n 59) 71: 'if States cannot escape the operation of *jus cogens*, they certainly cannot create an [international organisation] which is unbound by it'.
[166] De Wet (n) 189; Peters (n 16) 818.
[167] De Wet (n) 189-190.
[168] Peters (n 16) 818.
[169] Ian Brownlie, 'Discussion' in Joseph Weiler and Antonio Cassese (eds), *Change and Stability in International Law-Making* (Walter de Gruyter 1988) 108, 110: '*jus cogens* has become part of *lex lata*. At the same time … the vehicle does not often leave the garage'; Rosalyn Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 *International and Comparative Law Quarterly* 791, 801: 'The examples are likely to be very, very few in number'; for a more expansive take, cf Orakhelashvili (n 153).

State Responsibility, the list of norms clearly accepted and recognized as peremptory extend only to the prohibition of aggression, genocide, slavery, racial discrimination, apartheid, crimes against humanity, torture, and the right to self-determination.[170]

The lack of a scholarly consensus is perfectly illustrated in the following polar-opposing observations: Georges Abi-Saab once described the category of *jus cogens* as an 'empty box'.[171] Contrastingly, Anthony D'Amato certainly does not believe the box to be empty – D'Amato expresses serious concern at the propensity for scholars to view various rules of international law as being peremptory with little or no substantive basis. He described this as the 'Pandora's Box approach to supernorms'.[172] Indeed, in contemporary practice, there has been no shortage of attempts to add to this list. Orakhelashvili, for example, argues that a number of the principles and purposes of the UN are in fact peremptory.[173] The author identifies not only the principle of self-determination, as described above, but also the protection of fundamental human rights generally.[174] Indeed, this would give weight to the suggestion that the principles and purposes constituted substantive limits on Council decision-making. As a corollary of the principle of self-determination, for example, it can be argued that the Security Council would be prohibited from imposing a system of government on a population of a State or any other entity.

If we accept that certain principles of the United Nations constitute *jus cogens* norms, a curious question arises when we consider whether the Council, when authorising the use of force under Chapter VII, is itself bound to comply with the prohibition on the use of force. The prohibition is commonly identified as a norm of *jus cogens.*[175] According to Orakhelashvili, 'the fact that the Council may authorize force under Chapter VII does not mean that it is free to disregard

[170] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries', in Report on the Work of Its Fifty-third Session (23 April 1 June and 2 July - 10 August 2001) UN Doc A/56/10, at 85, para 5.
[171] George Abi-Saab, 'The Third World and the Future of the International Legal Order' (1973) 29 *Revue Egyptienne de Droit International* 27, 53 (cited in Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens'* (2008) 19(3) *European Journal of International Law* 491, 491).
[172] Anthony D'Amato, 'It's a Bird, It's a Plane, It's Jus Cogens?' (1990) 16 *Connecticut Journal of International Law* 1.
[173] Orakhelashvili (n 153) 67.
[174] Ibid.
[175] *Nicaragua* at para 190; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, at 254 (Separate Opinion of Judge Elaraby): 'the prohibition of the use of force … is universally recognized as a *jus cogens* principle, a peremptory norm from which no derogation is permitted'.

the basic prohibition of the use of force'.[176] According to this argument, as the Security Council's competence is, in fact, part of the norm, it has to exercise it powers correctly in order to avoid violating the norm. The United Nations Committee on Economic and Social Rights has suggested that the provisions of the International Covenant on Economic, Social and Cultural Rights, 'virtually all of which are also reflected in a range of other human rights treaties as well as the Universal Declaration of Human Rights, cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions' under Chapter VII.[177] Barnidge suggests, similarly, that *'jus cogens* can operate in a way in which the minority elite can control and monopolise the terms of legal debate'.[178] Indeed, as a final word, especially as applied to Security Council practice, the concept of *jus cogens* would appear so far removed from actual practice it arguably only holds traction on a scholarly level.

2.2.2. Human Rights

It is certainly true that 'until recently, the UN had never thought of itself as actually capable of violating human rights'.[179] The question as to whether the Council is bound by human rights instruments has been explicitly framed as a 'constitutional' question. Peters suggests that 'the constitutionalist argument is that the more powerful the Security Council gets, and the more its decisions interfere with (human) rights of individuals, the more necessary it is to build safeguards against the Council's potential abuse of powers, and against the possibility of a violation of those rights'.[180]

Reference could be made to Article 1(3) which encourages 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion', or Article 55(c) which calls upon the organisation to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all'. We might ponder the logic

[176] Orakhelashvili (n 153) 62.
[177] United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights' (12 December 1997) UN Doc E/C.12/1997/8, at para 7.
[178] Robert P Barnidge Jr, 'Questioning the Legitimacy of Jus Cogens in the Global Legal Order' (2008) 38 *Israel Yearbook on Human Rights* 199, cited in James Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 *Michigan Journal of International Law* 215, 218, fn 8.
[179] Frédéric Mégret and Florian Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' (2003) 25 *Human Rights Quarterly* 314, 314.
[180] Peters (n 16) 810.

behind a state of affairs under which the United Nations having laid the foundations for the system of international human rights protection, would create an expectation that its primary organs, including the Security Council, could act in defiance of these rights. However, the primary addressees of these provisions are states. Additionally, these provisions are aspirational in character and do not state that the United Nations itself, or its organs, are bound to respect human rights. Thus, 'the Charter does not create any immediately enforceable human rights'.[181] Hans Kelsen argues in the following that the lack of a definition for human rights impeded their protection: '[t]he Charter does, in no way, specify the rights and freedoms to which it refers. Legal obligations of the Members in this respect can be established only by an amendment to the Charter or by a convention … ratified by the Members'.[182]

This has not stopped a number of commentators from arguing in favour of human rights obligations. Orakhelashvili, for example, states categorically that the 'Security Council can never be entitled to infringe upon human rights embodied in universal human rights instruments'.[183] However, as the Council is not directly party to any international human rights instruments, the consensus view is that it cannot be directly bound by them.[184] Instead, it has been suggested that the Council is bound indirectly.

There are four potential lines of argument which might support a claim that the Council is, nevertheless, obliged to comply with international human rights law when acting under Chapter VII.[185] The first encourages a 'systemic interpretation' of the Charter as a whole.[186] Article 31(c) of the Vienna Convention provides that the 'relevant rules of international law applicable in the relations between the parties' must be taken into account when interpreting the Charter. Indeed, it is implausible that member states forego their own human rights obligations when transferring competences to international organisations. It is a given that the member's responsibility continues after the transfer. This reasoning resonates with August Reinisch's proposal of a 'functional treaty succession by international organizations to the position of their member states'; that is, that the Council is bound 'transitively' by international human rights

[181] *Al Jedda* at para 77.
[182] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Praeger 1950) 342.
[183] Orakhelashvili, 'The Impact of Peremptory Norms' (n 153) 63.
[184] Devika Hovell, 'The Deliberative Deficit: Transparency, Access to Information and UN Sanctions' in J Farrall and K Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalized World* (Cambridge University Press 2009) 92, 98; Peters (n 16) 822
[185] Peters (n 16) 822-825.
[186] Ibid 822.

standards as a result and to the extent that its members are bound, this is very much a minority opinion.[187] However, there is nothing in this argument to suggest that the organisation itself is responsible. The Security Council is subject of international law unproblematically. However, how and why, specifically, the Council has human rights obligations is not so clear-cut. The argument that the Council is bound simply by virtue of the fact that most of its members are bound is only plausible upon a conception of the Council as a mere vehicle for its member states, and it would make a mockery of the separate legal personality of the United Nations.[188] The concept of international personality, or subjects of international law, is based on a distinction between particular subjects and their particular rights, duties or powers.[189]

The subjects of law in any given legal system 'are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community'.[190] Indeed, the International Court had already stated in 1949 that the organisation 'occupies a position in certain respects in detachment from its Members'.[191] As the Court also ruled, 'international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'.[192] Where Peters concludes that there '*should be* a legal option to responsibilize the UN itself, too',[193] this hints at the fact that there is currently no such option, as a matter of positive international law.

A second perspective might hold that the Council has essentially bound itself to respect human rights, 'by unilateral declarations', for example in Presidential Statements, 'and consistent practice'.[194] In Security Council resolution 1456, for example, the Council explicitly stated that 'any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular, international human rights, refugee, and humanitarian law'.[195] This might be taken to demonstrate that the Council does not intend to violate human rights in its resolutions. It is one

[187] August Reinisch, 'Securing the Accountability of International Organizations' (2001) 7(2) *Global Governance* 131, 141-143.
[188] Jan Klabbers, 'Contending Approaches to International Organizations' (n 2) 18.
[189] Niels M Blokker, *International Institutional Law* (3rd edn, Martinus Nijhoff 1995) 976.
[190] *Reparations* at 178.
[191] *Reparations* at 179.
[192] *Interpretation of the WHO* at 89-90.
[193] Peters (n 16) 823.
[194] Ibid 824.
[195] UNSC Res 1456 (20 January 2003) S/RES/1456, at para 46.

thing for the Council to acknowledge, rhetorically, the importance of human rights compliance in its decision-making.[196] It may even be that on a political or moral level, this represents the prevailing opinion among Council members. It is quite another thing, however, to suggest that this manifests in a conclusive legal opinion of the Council. In any event, the Council is under no legal obligation to follow its own previous decisions and statements. Also, this argument overplays the extent of the practice in relation to human rights compliance. The continuing controversy vis-à-vis the Al Qaeda and ISIL sanctions regime is a testament to this.[197] Finally, this argument suffers from a sources problem. It is not clear as a matter of positive law how the Council can bind itself in this way. Namibia advisory opinion, holding that Article 25 of the Charter's notion of Council 'decisions', which are binding in nature, is not confined merely to Chapter VII resolutions, and are subject to no particular requirement of form. However, the orthodoxy has so far been that presidential statements impose only political, not legal obligations.[198]

A third argument might suggest that the United Nations is under some kind of special obligation with respect to treaties concluded under its auspices.[199] Under this line of reasoning, the organisation would be bound by the Genocide Convention because this Convention was concluded under its auspices. However, the operationalisation of this rule would be extremely problematic; there is no general rule in international law that specifies that facilitating the conclusion of a treaty, or being a beneficiary of a treaty, helps to create duties. Indeed, the law of treaties positively militates against this by distinguishing between the creation of a right (including any benefit) for third parties and the creation of an obligation for third parties.[200]

According to a fourth, and final interpretation, the Council might be said to be bound by those human rights norms that have passed over into general international law. To be clear, these obligations to comply with human rights norm would be separate to its obligations under the Charter. Akande argues instead that as the United Nations has been endowed with legal

[196] See, eg, 'Statement by the President of the Security Council' (29 June 2010) UN Doc S/PRST/2010/11, at 2: 'The Council reiterates the need to ensure that sanctions are carefully targeted in support of clear objectives and designed carefully so as to minimize possible adverse consequences'.
[197] See, chapter 2, section 3.1.
[198] See, eg, Stefan Talmon, 'The Statements by the President of the Security Council' (2003) 2 *Chinese Journal of International Law* 419, 447.
[199] Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act' (2017) 28(4) *European Journal of International Law* 1133, 1143,
[200] See, Vienna Convention on the Law of Treaties (1969) arts 34-37. As Jan Klabbers notes ibid, 'a right can be accepted by using it; an obligation must be accepted expressly and in writing'.

personality, it must at least comply with those human rights obligations that have become part of customary international law.[201] However, as Peters rightly counters, while a number of human rights norms have surely crossed over into customary international law, it does not automatically follow that there has been a shift in relation to primary addresses of these rules, from states to international organisations.[202] Thus, in order for the Council to be bound by customary international human rights, this would require a structural change: the relevant obligations to respect, protect and fulfil would need to be extended to the UN, and such a 'normative evolution would have to be based on [state] practice and *opinio juris'*.[203] So far it is difficult to identify such an evolution.

2.2.3. Proportionality

The doctrine of proportionality has been explicitly identified as an element of constitutionalism. According to Loughlin, '[c]onstitutionalisation is required to ensure that public power, in whatever manifestation, is exercised in accordance with the canons of rationality, proportionality, and by means that involve the least restrictive interference with the enjoyment of the individual's basic rights'.[204] Some commentators have argued that the principle of proportionality provides a substantive limitation on Security Council decision-making.[205]

Proportionality is often divided into three elements: suitability, necessity, and proportionality *strictu sensu*.[206] 'Suitability' requires that the measures in question are appropriate, or rationally connected, to the objective sought. There is some argument to suggest that proportionality constitutes a *lex specialis* limitation. To be sure, on face value, Article 42 contains something of an inbuilt limitation, in that the Council can only take 'action by air, sea, or land forces *as may be necessary* to maintain or restore international peace and security' (emphasis added). The English language version of the Charter would appear to leave some doubt as to whether the measures 'must be' or 'may be' necessary. The French text, however,

[201] Akande (n 153) 323-324.
[202] Peters (n 16) 824.
[203] Peters (n 16) 824.
[204] Loughlin, 'What is?' (n 3) 162.
[205] Orakhelashvili, 'The Impact of Peremptory Norms' (n 153) 63; Gardam (n 97); Tzanakopoulos, *Disobeying the Security Council* (n 59); Henderson (n 20).
[206] See, generally, Emily Crawford, 'Proportionality' in *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law 2011) para 2 http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1459

states that the Council *must* decide whether the measures are necessary.[207] According to Gardam, 'the reference to necessary in this context carries with it an understanding that the measures adopted will be proportionate to that aim'.[208] In *Nicaragua,* the International Court of Justice held, in relation to a treaty provision containing the term 'necessary', that 'whether a measure is necessary [is not] purely a question for subjective judgment of the party; the text does not refer to what the party "considers necessary"'.[209] As the European Court of Human Rights asserted, albeit in another context, 'the adjective "necessary" … is not synonymous with "indispensable" … neither has it the flexibility of such expression as "admissible", "ordinary" … "useful" … "reasonable" … or "desirable".[210]

That said, neither Articles 39 nor 41 make any reference to the notion of proportionality. To Erika de Wet, 'the freedom of the Security Council to choose a (combination of) measures under Chapters VI and/or VII … already indicates that it is not bound by a general principle of proportionality.[211] However, Tzanakopoulos uses the same premise to reach a different conclusion. He claims that, as 'discretion can only exist within the law, then such 'margins of appreciation' always find their outer limits in the principles of proportionality'.[212] Tzanakopoulos argues that non-forcible measures must also be 'conducive to the maintenance of international peace and security, because of the functional connection between Articles 39 and 41'.[213] It is further arguable that, given that the Council is obliged to act in accordance with the Purposes and Principles of the Charter, the first of which is the maintenance of international peace and security,[214] that any action that manifestly ran counter this aim would be unlawful.[215] There is some tentative support in state practice also. Brazil has suggested, for example, that 'in the event that the use of force is contemplated, action must be judicious, proportionate' and 'must produce as little violence and instability as possible and under no circumstances can it generate more harm than it was authorized to prevent'.[216]

[207] Oosthuizen (n 97) 555.
[208] Gardam (n 97) 189.
[209] *Nicaragua* (Merits) para 282.
[210] *Handyside v United Kingdom* (Judgment (Merits)) App No 5493/72 (7 December 1976) at para 48.
[211] De Wet (n 31) 184-185.
[212] Tzanakopoulos, *Disobeying the Security Council* (n 59) 64.
[213] Ibid
[214] UN Charter (1945), art 1(1).
[215] Henderson (n 20) 129-139.
[216] 'Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General' (11 November 2011) UN Doc A/66/551-S/2011/701, at paras 11(e)-(f).

If this sentiment is accepted as a matter of principle, and there is strong evidence to suggest that proportionality does exist as general principle of international law,[217] the level of deference conferred on the Security Council would, however, be very great indeed, and this would imply a very broad margin of appreciation in favour of the Council, at this first stage of the analysis. At the second stage, 'necessity' provides that the objective can only be achieved by the measures in question; that is, if there is a choice between several suitable measures, then the least onerous measure must be chosen. It is submitted that the principle of proportionality might apply to Chapter VII decisions in the first sense; that is, that enforcement measures must be conducive or appropriate to the maintenance of international peace and security.[218] However, this procedural requirement is essentially overcome as soon as the Council has made an Article 39 determination. More importantly, it would seem that adherence to the principle of proportionality is, essentially, no more than a reference to the *ultra vires* doctrine, just in another name. That is, conduct which goes beyond (is disproportionate to) the scope of the Council's Charter-based powers would amount to an abuse of power. Its invocation, in this formal sense, does not add any substantive value to the principle of proportionality itself.

The substantive value can be found in the second sense, the principle of proportionality usually implies that the aim should be pursued in the least restrictive means. Gardam argues that 'necessity is a principle of general international law that all force shall be by way of last resort'.[219] However, applying this principle to the Security Council's Chapter VII decision-making would imply that the Council is obliged to exhaust all non-binding and non-forcible enforcement measures before resorting to the use of force. This is, on face value, not compatible with the raison d'etre of the Council, to take quick and efficient action.[220] It is also not the case in practice. Finally, in the narrowest sense, proportionality relates to balancing the effects of measures chosen against the objective sought, considering whether those effects are excessive according to those most affected. This type of balancing test may well have been what Tzanakopoulos was proposing when he referred to the principle of proportionality as 'a freestanding obligation under general international law – not superseded by the Charter for lack

[217] See, Crawford (n 206) 1. For a sceptical view, cf Rosalyn Higgins, *Problems and Process: International Law and How We Use it* (Oxford University Press 1994) 228-237.
[218] Tzanakopoulos, *Disobeying the Security Council* (n 59) 64-65; Talmon, 'World Legislator' (n 10) 183.
[219] Gardam (n 97) 189.
[220] De Wet (n 31) 185.

of any normative conflict between the two sources – [which] dictates a stricter proportionality test'.[221]

In short, if the Council breaches an obligation *lex specialis*, its act is *ultra vires*. However, there is an extremely high threshold, considering Council decisions benefit from a presumption of *intra vires*.[222] If the Council breaches an obligation *lex generalis*, the act itself is *intra vires*, but is still unlawful.[223] The question remains though, who is to hold the Council to account for a breach of an international obligation? Legal constitutionalism would suggest a preference for the international judiciary. The competence of the International Court of Justice to review Council decisions is the subject of the final section of this chapter.

3. Sanction: Accountability as Retrospective Mechanism

To say that there are limitations on the power of the Security Council does not necessarily mean that the question whether those limits have been exceeded can be judicially determined. As Judge Shahabuddeen stated in the *Lockerbie* case, 'how far the Court can enter into the field is another matter'.[224] In *Certain Expenses*, the International Court of Justice stated that 'each organ must, in the first place at least, determine its own jurisdiction'.[225] Even if the legal standards binding the Council could be identified with greater certainty, a recognition that the Security Council acts within legal limits is very different from the proposition that these legal limits may be enforced against the Council by a court or tribunal.[226]

In accordance with the dictum from the *Namibia* Advisory Opinion, *prima facie*, the Court is not a constitutional court, and does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned'.[227] In a similar way, in the *Northern Cameroons* case, the Court acknowledged that decisions of the political organs of the United Nations could not be reversed by the judgment of the Court'.[228] Thus, the Court has a

[221] 5966.
[222] *Expenses* at para 188; *Namibia* at para 20.
[223] Tzanakopoulos, *Disobeying the Security Council* (n 59) 83.
[224] *Lockerbie* at para 142.
[225] *Expenses* at para 168.
[226] Hovell (n 184) 104.
[227] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1971] ICJ Rep16, at para 89.
[228] *Case Concerning the Northern Cameroons (Cameroon v UK)* (Preliminary Objections) [1963] ICJ Rep 15, at 33.

very limited understanding of its own competence to review Security Council decision-making under Chapter VII, under modes of it jurisdiction, advisory opinions and contentious proceedings.[229] Such a proposition is in direct obstruction to the traditional notion of legal accountability within domestic constitutional settings, 'whereby judicial review of executive action is an essential element of the rule of law'.[230]

On the one hand, some scholars subscribe to the view that 'for such powers to exist there must be an express norm authorizing judicial review. These powers cannot be implied.'[231] In the absence of such express authorisation, the scope of discretion granted to the Council thus forces courts into something of an 'all-or-nothing' approach under which they either abdicate any effective judicial role in reviewing the Council's exercise of discretion, or assume an inflated role that entitles them to subsume the Council's role in exercising that discretion.[232] On the other hand, however, it is arguable that 'No special court has judicial review jurisdiction as such because it inheres in the notion of judicial power, unless specifically and validly excluded'.[233] The Charter and the Court's Statute, which entitles the Court to decide any question of international law, do not expressly exclude judicial review, nor can such outcome be inferred by necessary implication; especially as the Council is not *legibus solutus*. Even if each principal organ remains *prima facie* a judge of its competence, the exercise of such competence undoubtedly involves legal questions on which the International Court of Justice is empowered to adjudicate, subject to usual jurisdictional requirements.[234]

Whereas the precursor to the Court, the Permanent Court of International Justice was, by its Statute, completely independent of the League Covenant, the International Court of Justice Statute is viewed as an 'integral part' of the Charter and the International Court of Justice is the 'principal judicial organ of the United Nations'.[235] But the Charter itself offers no further determination as to whether the International Court of Justice has the power to judicially review

[229] The Belgian proposal to endow the International Court with respective review powers was not adopted at San Francisco. See, Geoffrey Watson 'Constitutionalism, Judicial Review and the World Court' (1993) 34 *Harvard International Law Journal* 1, 8-14; Orakhelashvili (n 153) 87.
[230] See, eg, Anthony W Bradley and Keith D Ewing, *Constitutional and Administrative Law* (15th edn, Pearson 2011) 669-704.
[231] Krzysztof Skubiszewski, 'The International Court of Justice and the Security Council' in Vaughan Lowe and Malgosia Fitzmaurice, *Fifty Years of the International Court of Justice* (Cambridge University Press 1996) 623.
[232] Devika Hovell, 'A Dialogue Model: The Role of the Domestic Judge in Security Council Decision-Making' (2013) 26(3) *Leiden Journal of International Law* 579, 588.
[233] Bradley and Ewing (n 230) 508.
[234] Orakhelashvili (n 153).
[235] Article 92, UN Charter (1945).

decisions of the Security Council. The only part of the Charter that deals with the Court in any detail is Chapter XIV, and even this Chapter speaks in only the most general terms. Article 93 provides that all states party to the Charter are *ipso facto* parties to the Statute of the Court.[236] Article 94 obliges states party to disputes before the Court to abide by its judgments and allows the prevailing party to seek assistance from the Security Council in the event the losing party fails to comply with the judgment.[237] No provision of Chapter XIV explicitly addresses judicial review. There is also no express power conferred by the Statute of the International Court of Justice.

3.1. Orthodox Understanding: Security Council Decisions are not Subject to Judicial Review

The orthodox understanding is that the question whether a certain situation is a threat to the peace or a breach of the peace or involves an act of aggression is a non-justiciable question. It is viewed as a question which cannot be answered with recourse to legal reasoning as there are no legal standards by which to reach a decision, as the question is a political question to be answered by the Security Council, a political body.[238] Scholars writing in support of this assertion frequently cite the words of the United States Supreme Court in *Baker v Carr*, there are no 'judicially discoverable and manageable standards'.[239] Following directly from the fact that the Charter gives extremely broad discretion to make the determination of the existence of a threat to the peace, breach of the peace or an act of aggression to the Security Council, the jurisprudence of the International Court of Justice would suggest that no other body is allowed to 'second guess' the decision once it has been made.[240] For example, Judge ad hoc Lauterpacht in the *Bosnia Genocide Convention* case, while expressing the view that the Court may have some power to judicially review, thought that this power 'does not embrace any right to the Court to substitute its discretion for that of the Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression or even the political steps to be taken following such a determination'.[241] This view was also supported by some of the judges in *Lockerbie*. Judge Weeramantry, for example, stated:

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[236] Article 39, UN Charter (1945).
[237] Article 94, UN Charter (1945).
[238] Akande (n 153) 338.
[239] (1962) 369 US 186 (Supreme Court) at para 217; see, further, *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) at para 24; *Certain Expenses* at 155.
[240] Akande (n 153) 338.
[241] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Provisional Measures) (Order of 8 April 1993) [1993] ICJ Rep 3 (separate opinion of Judge ad hoc Lauterpacht) at para 439.

> The determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression is one entirely within the discretion of the Council. That decision is taken by the Security Council in its own judgment and in the exercise of the full discretion given to it by Article 39. Once taken the door is opened to the various decisions the Council may make under the Chapter.[242]

Similarly, in the *Kanyabashi Case*, the International Criminal Tribunal for Rwanda found that:

> … [T]he Security Council has a wide margin of discretion in deciding when and where there exists a threat to international peace and security. By their very nature, however, such discretionary assessments are not justiciable since they involve the consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively by this Trial Chamber.[243]

The traditional understanding, as opined in the *Certain Expenses* opinion, is that if action is appropriate 'for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organisation. The Security Council is not legally required to indicate any specific article upon which it bases its decision; the choice of legal basis depends on the objective pursued'.[244] As such, the presumption of legality cannot be rebutted easily. As Judge Morelli stated in his Separate Opinion in *Certain Expenses*: 'it is only in especially serious cases that an act of the organisation could be regarded as invalid, and hence an absolute nullity.[245]

The above notwithstanding, Dapo Akande has submitted that the better view is that 'lack of an express power of review is not, however, determinative'.[246] Akande argues that while not every system of law possesses a means for judicially reviewing unconstitutional acts of the executive, in practically all the cases where domestic systems do not engage in judicial review of executive or legislative action the reason is that they are specifically prohibited from doing so. It is difficult to find any municipal order where judicial review is not prohibited and where the judges have not declared that they have this power.[247]

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[242] *Lockerbie* (dissenting opinion of Judge Weeramantry) at 66.
[243] *Prosecutor* v *Joseph Kanyabashi* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTR-96-15-T (18 June 1997) at para 20.
[244] cf UNGA, Improving the Working Methods of the Security Council: Draft Resolution (2006) UN Doc A/60/L49, at para 13: 'A permanent member of the Security Council using its veto should explain the reason for doing so at the time the relevant draft resolution is rejected in the Council and a copy of the explanation should be circulated as a Security Council document to all Members of the Organization'.
[245] *Certain Expenses* at para 223.
[246] Akande (n 153) 326.
[247] Akande (n 153) 326-7.

Therefore, and however seemingly definitive in its language, it might be argued that the *Namibia* opinion does not categorically rule out judicial review for at least two reasons. First, the Court indicated that its advisory opinion was based on the limited scope of the request for an Advisory Opinion from the General Assembly and, 'the question of the validity or conformity with the Charter … of related Security Council resolutions [did] not form the subject of the request for an advisory opinion.'[248] Second, the Court has indeed in the past scrutinised certain Security Council resolutions in order to respond to the objections put before it, albeit in a limited manner. In the *Certain Expenses* case, as well as the later *Lockerbie* decision, which are commonly cited as examples of the Court not being willing to question the validity of Security Council decisions, the Court used the language of presumption of validity of those decisions and did not necessarily suggest that such decisions enjoy absolute validity and would be immune from judicial review in different circumstances.[249] The *Certain Expenses* Opinion in particular emphasises the limited and delegated nature of the powers of the United Nations, by postulating the presumption of an act performed pursuant to those purposes not being *ultra vires,* as opposed to being unconditionally valid.[250] It would seem that acts of the Security Council only enjoy a *prima facie* validity; not a conclusive presumption but rebuttable which can be challenged in the final analysis.[251]

It might also be argued that Article 103 implicitly authorises the International Court of Justice to invalidate treaties inconsistent with the Charter and that this authorisation, in turn, implies a power to invalidate Security Council acts that are *ultra vires.*[252] As discussed, the scope of Article 103 is not broad enough to override norms that have peremptory status. In the *Kadi* case, the Court of First Instance of the European Communities directly linked the exercise of judicial review to *jus cogens* norms. It was affirmed by the Court that if a peremptory norm is breached by the actions of the Security Council judicial review will follow. The Court held that it had 'jurisdiction to review the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of

[248] Ibid.
[249] Ibid.
[250] *Certain Expenses case* at para 168; see also, *Namibia* at para 22; *Lockerbie* at paras 15 and 126.
[251] Derek Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures' (1994) 5 *European Journal of International Law* 89, 93.
[252] Watson (n 229) 7.

international law falling with the ambit of *jus cogens'*.[253] The question, therefore, is whether the International Court of Justice is equally certain as to their position and whether the Court has the power to review Security Council decisions. However, whether the Court can or does declare an act *ultra vires* does not, in and of itself, determine the ultimate validity of the act.[254] 'That there is no mechanism for sanctioning the Security Council if it breaches the Charter', concludes Mohammed Bedjaoui, 'in no way weakens the principle that the Council is subjected to the Charter.'[255] To argue otherwise, he suggested, would be akin to giving 'a prisoner the keys to his jail, so that the obligation to remain deprived of liberty depended solely upon himself'.[256]

3.1. Contentious Cases

In contentious cases, any decision on the legality of a Council decision will be *res judicata* only for the parties to the dispute and will not bind the Council itself, or even members of the Council who are not parties to the dispute.[257] However, the court is not necessarily prohibited from scrutinising Council decisions in an incidental fashion in contentious proceedings between states. As the court stated in the *Tehran Hostages* case: 'It is for the Court, the principal judicial organ of the United Nations, to resolve any legal question that may be at issue between parties to the dispute'.[258] First, it should be acknowledged that Article 34(1) limits parties to contentious cases to states;[259] which means that it is not possible for a direct challenge to the validity of a Security Council decision to arise in such cases as neither the Council nor the United Nations as a whole has any *locus standi*. Considering the requirement of International Court of Justice jurisdiction in accordance with Article 36 of the International Court of Justice Statute, and the low number of recognitions of compulsory jurisdiction under Article 36(2); it will indeed be very rare that a state which sees itself unlawfully targeted by a Security Council decision will have a legal controversy with another state to which this

[253] Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECLI:EU:T:2005:332, at para 282.
[254] Michael Glennon, *Limits of Law, Prereogatives of Power: Interventionalism after Kosovo* (Palgrave 2001) 104.
[255] Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (Martinus Nijhoff 1994) 28-29.
[256] Ibid.
[257] Article 59, Statute of the ICJ (1945).
[258] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep, at para 93.
[259] Article 34(1), Statute of the ICJ (1945).

decision is relevant.[260] There have been various proposals for an amendment to Article 34(1) of the Court's Statute so as to allow *locus standi* for international organisations, such as the UN.[261] The argument in favour of allowing international organisations to appear before the International Court of Justice in contentious cases is strong. If organisations have rights and duties under international law and can bring international claims or have claims brought against them,[262] then there is no obvious reason for restricting the *ratione personae* jurisdiction of the International Court of Justice to states.

However, the Court's function in contentious cases is to decide the legal rights and responsibilities of states and, in as far as a Security Council resolution may appear to determine or impinge upon those rights or responsibilities. According to one perspective, it may be within the Court's function to determine whether that decision does so legally.[263] As Judge de Castro noted in his separate opinion in *Namibia*, 'the Court, as a legal organ, cannot cooperate with a resolution which is clearly void, contrary to the rules of the Charter, or contrary to the principles of law'.[264] Article 36(1) provides that '[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.'[265] Article 36(2) states that any party to the statute[266] may at any time make a declaration recognising the compulsory jurisdiction of the Court in relation to any question of international law.[267] If there are questions in international law as to the competence of the Security Council to act in a particular manner or as to the competence to affect the rights of a state in a particular case, those questions should not be excluded from the legitimate consideration of the Court. When viewed from this perspective, it might be argued that the Security Council is no different from any other organ of the United, with specific limits placed on its powers by the Charter itself.[268] Where the Court is asked to choose between applying a provision of the Charter or a decision of the Security Council, the Court is

[260] Bardo Fassbender, 'Quis judicabit? The Security Council, Its Powers and Its Legal Control' (2000) 11(1) *European Journal of International Law* 219, 223.
[261] Karel Wellens, *Remedies against International Organizations* (Cambridge University Press 2002) 236; Tzanakopoulos, *Disobeying the Security Council* (n 59) 91.
[262] See generally, *Reparations Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174.
[263] Akande (n 153) 332.
[264] *Namibia* (separate opinion of Judge de Castro) at para 180.
[265] Article 36(1), Statute of the ICJ (1945).
[266] All 193 member states of the UN are currently party to the Statute of the ICJ.
[267] Article 36(2)(d), Statute of the ICJ (1945).
[268] Akande (n 153) 332.

bound to choose the 'higher law' ─ which in this case is the Charter.[269] That said, any accountability function that this would play would at best be indirect, because the Council itself would, of course, not be a party to the subsequent proceedings and would, therefore, not be bound to comply with the Court's judgment.

3.2. Advisory Opinions as 'Quasi-Judicial Review'?

Any accountability function providing by advisory opinions would be indirect; they are,o course, by definition merely 'advisory' in nature and hence non-binding.[270] Advisory opinions are also criticised on the ground that they are speculative and based on hypothetical, abstract, academic considerations. It is argued that courts require the specific facts of an actual controversy to illuminate the complexities of legal issues and therefore should not and cannot resolve abstract legal questions.[271] Finally, there is a risk of drawing courts into essentially political controversies, at the risk of their impartial image and abandonment of truly judicial standards.[272]

Additionally, the suitability of the judiciary to exercise this control is questioned by those who view judges, themselves, as unaccountable, they argue that the executive and legislative branches are more democratic since they are directly elected and therefore accountable to the wider community.[273] However, to others, the criticism that judges are neither representative nor accountable seems to be less pronounced in the United Nations than in some national systems. Indeed, judges are directly elected by the Security Council and the General Assembly. The International Court of Justice is also a much more representative body than the Security Council itself. All the major regions of the world are represented in the International Court of Justice and no state holds a veto in the decision-making process.[274] Furthermore, since judges

[269] Ibid. This is implicit in the reasoning of the Swiss Bundesgericht in *Youssef Mustapha Nada gegen SECO, Staatssekretariat für Wirtschaft* (14 November 2007) 1A.45/2007, ILDC 461 (CH 2007) (Federal Tribunal).
[270] See, de Wet (n 31) 28.
[271] Ibid.
[272] Kennedy argues that the characteristic agenda of an advisory opinion is political rather than judicial. Robert H Kennedy, 'Advisory Opinions: Cautions about Non-Judicial Undertakings' (1989) 23 *University of Richmond Law Review* 174, 179.
[273] See, eg, Ken Roberts, 'Second-Guessing the Security Council: The International Court of Justice and its Powers of Judicial Review' (1992) 7(2) *Pace International law Review* 308, 312-313; Geoffrey Watson (n 229) 28.
[274] Erike de Wet, *Chapter VII* (n 31) 120.

must step down or run for re-election every nine years, they can be made accountable for irresponsible decisions by not being re-elected.[275]

Those in favour of a more expansive reading of advisory opinions suggest that their non-binding nature is merely a technical point. In practice advisory opinions are treated as having the same efficacy, authority and precedential value as a judgment in contentious proceedings and the referring authority have almost always honoured the opinions given. Also, the advisory procedure usually provides courts with discretion to decline to give opinions in certain circumstances, potentially circumventing the risk that opinion may relate to speculative, abstract and academic considerations.[276] Finally, the fear of improper involvement of the judiciary in political disputes can also be diluted if both the referring and answering authorities act with self-restraint.[277]

Under Article 96 of the Charter, the General Assembly or the Security Council may request the International Court to give an advisory opinion on any legal question.[278] The General Assembly may also authorise other organs of the United Nations or the specialised agencies to request advisory opinions of the Court on legal questions arising within the scope of their activities.[279] This provision effectively empowers any organ on any legal question arising within the scope of their activities. However, the key operational difference is that the Asssembly and the Security Council have the competence to request an opinion on *any legal question*, whether or not arising within the scope of their activities. This may cover even abstract legal questions on issues which have not yet arisen.[280] If therefore it is politically impossible to obtain the necessary majority required for one of these organs to request an opinion on its own actions, it is legally possible and not inconceivable that the other organ could request such an opinion. However, the Security Council will hardly challenge a resolution previously adopted by itself, and the chances of gaining a majority in the Assembly for a request of an advisory opinion – which is synonymous with a vote of no confidence with a Security Council decision will usually be slim.[281]

[275] Article 13, UN Charter (1945).
[276] De Wet (n 31) 29.
[277] Ibid.
[278] Article 96(1), UN Charter (1945).
[279] Article 96(2), UN Charter (1945).
[280] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, at 809.
[281] Fassbender, 'Quis judicabit?' (n 260) 223.

The Court has not been entrusted with any formal power of judicial review over the legality of the actions of the organs of the United Nations at the request of a member state. However, it might be argued that the advisory opinion process amounts to form of quasi-judicial review. When the Court interprets the Charter provisions relating to the functions and powers of the Security Council, it cannot avoid the issue of the legality of the Council's action, be it implicitly. To Skubiszewski, this 'opens up a road' to indirect review through the Court's advisory jurisdiction.[282] He argues that it need not be a direct question raising the problem of lawfulness with regard to the Council. The latter point is illustrated by the *Admission to Membership* case.[283] As individual votes cast in the Security Council lead to the creation of the act of that organ, in this instance a recommendation to admit a candidate country to the Organization, the Court's advisory opinion, by explaining the limits of action under that provision, equally and actually concerned the conformity of the conduct of the Security Council with the Charter.[284]

Conclusion

There is some tentative judicial support for the claim that the power of the Security Council is not unlimited. Two dissenting judges in the *Namibia Advisory Opinion* expressed the opinion that the Security Council is not free to characterise any situation as one that threatens the peace. Judge Gros remarked: 'to assert that a matter may have a distant repercussion on the maintenance of peace is not enough to turn the Security Council into a world government.'[285] Also, Judge Sir Gerald Fitzmaurice stated that the *occasions* on which the Security Council can act in the preservation of peace and security are not limited, 'provided the threat said to be involved is not a mere figment or pretext'.[286] The Charter does not explicitly exclude the competence of the International Court of Justice, as it does with the General Assembly in Article 12.[287]

[282] Skubiszewski (n 231) 626
[283] *Admission to Membership* at 57.
[284] See, Krzysztof Skubiszewski, 'The International Court of Justice and the Security Council' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996) 626.
[285] *Namibia* (Dissenting opinion of Judge Gros) at para 34.
[286] Ibid at para 112.
[287] Akande (n 153) 335-336.

However, as Gowlland-Debbas notes, if by judicial review we are to refer to the 'constitutional process of judicial review, *with compulsory effect*, it is clear that no analogous procedure' to that of domestic courts 'is to be found in the structure of the UN'.[288] The preceding overview of the case law is determinative of only one conclusion. The Court legally has not, cannot, and it is submitted, *de le ferenda,* should not constitute an appeal court for decisions of the Security Council. Judge Bedjaoui is correct, it is 'as a rule not the Court's role to exercise appellate jurisdiction in respect of decision taken by the Security Council.'[289] There is no constitutional basis for judicial review … in which a court finds action unconstitutional and void.[290]

The final section of the chapter pondered whether the engagement of responsibility in turn implied the potential for the imposition of legal remedies. If it does, then it was concluded that this hurdle is surely stymied by the fact that there is no court that can 'review' with any binding force the measures that the Security Council adopts under Chapter VII of the Charter. Given the absence of third-party dispute settlement mechanisms that can bind international organisations generally, legal constitutionalism will be extremely difficult to operationalise.[291] In short, given the inadequacy of the judicial function to rule on questions of policy discretion, which is mirrored even in domestic legal systems which provide for general powers of judicial review by the existence of a 'political questions' doctrine, coupled with the institutional equality of the Security Council and the International Court of Justice, there is little likelihood or possibility that accountability through the lens of legal constitutionalism can amount to any substantive degree of restraint or control upon the use of the Security Council's enforcement powers.

[288] Vera Gowlland-Debbas, 'The Domestic Implementation of UN Sanctions' in Erika de Wet and Andre Nollkaemper (eds), *Review of the Security Council by Member States* (Intersentia 2003) 66 (emphasis added).
[289] *Lockerbie,* ICJ Rep 1992, 35, at para 7.
[290] See generally, Erika de Wet and Andre Nollkaemper (eds), *Review of the Security Council by Member States* (Intersentia 2003) 184-5, who add a proviso that the term 'review' should be understood in a 'wider sense'.
[291] Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn, Cambridge University Press 2009) 292.

VI. Security Council Accountability through the Lens of Political Constitutionalism

> This is the place where most important decisions affecting international peace and security are hashed out. This is the place where most heated debates occur. This is the place where the diplomats who have the privilege to work in the Security Council spend the most interesting hours and days of their professional lives. This is, quite simply, the most fascinating place in the entire diplomatic universe.
>
> Vitaly I Churkin, Representative of the Russian Federation (2013)[1]

Introduction

At this juncture, it is banal to restate that the Security Council is the most powerful institution in global politics. From within the walls of the Council Chamber, large-scale military interventions are authorised, and widespread economic sanctions imposed against individuals; decisions are made *not* to impose enforcement measures in response to humanitarian crises and even genocide; international law is clarified, developed, and even made. It is, in many ways, 'the most fascinating place in the entire diplomatic universe'.[2] However, the Council Chamber is not the subject of Vitaliy Churkin's passionate remarks above. The Russian Representative to the Security Council is instead talking about the Consultations Room, which sits across the hall from the Chamber. Like the Chamber, the room consists of a horseshoe table, at which the Council members, the Secretary-General, and the Council's secretary sit in the same placement as in the Council Chamber. But it is much smaller. It can afford to be, as there is no need to accommodate representatives of non-Council member states, as only Council members can attend the 'informal meetings' or 'consultations of the whole' that take place therein; or the media, or members of civil society, as meetings are conducted in private with no official public record kept.

Critical discourse on the Security Council takes place predominantly across two sites. We might point, on the one hand, to the debate on holding the Council to account for the excesses of its powers; on the other, to the ongoing debate on reforming the Council along democratic

[1] Remarks made on the occasion of the Inauguration of the 'Russian Room' (Security Council Consultations Room) (27 March 2013) <http://webtv.un.org/search/inauguration-of-the-russian-room-security-council-consultations-room/2258040243001?term=consultationsandlanguages=Englishandsort=date>, cited in Loraine Sievers and Sam Daws, *The Procedure of the UN Security Council* (5th edn, Oxford University Press 2015) 589.
[2] Ibid.

lines. It is tempting to read the two primary sites of critical discourse as mutually exclusive enterprises. However, this would represent at best only a partial understanding of the term accountability, and at worst is a misuse of the term itself when understood as an inherently sociological concept. Recent emphasis on the working methods of the Security Council should be explicitly read as a constituent element of the broader accountability debate.[3] If accountability is understood instead as an ongoing process, one constantly shifting between prospective and retrospective elements, the two sites of critique should instead be viewed a mutually-inclusive, as *two sides of the same accountability coin.*

Legal constitutionalism prioritises the identification of substantive legal obligations incumbent upon the Security Council and the empowerment of international judicial organs to review Security Council decisions. On the contrary, political constitutionalism prioritises procedural rules over substantive obligations and concerns the role of political actors in the assessment of Security Council decision-making. At the heart of political constitutionalism is the notion of 'constituent power'. It is important to understand the relationship between the 'constituted power' (the Security Council) and the 'constituent power' (member states of the international community) in order to fully comprehend the nature of accountability as a sociological concept. In order to show this, this chapter traces political constitutionalism to its origins as a 'functionalist' idea. The functionalist perspective acknowledges that the Security Council was established to fulfil a particular function: the maintenance of international peace and security. Accountability of the Security Council thus concerns its capacity to live up to its original function. On the back of this observation, this chapter defends two principal claims. The first claim is that accountability necessitates an ongoing discursive process between the constituted power and the constituent power. Thus, political constitutionalism might offer a more appropriate framework of analysis as it accommodates the three 'registers' of Security Council accountability ('giving an account', 'taking an account of the consequences' and being 'held to account'). Legal constitutionalism, as an inherently retrospective idea, does not fare well against the first two registers. The second claim is that, as a corollary, political constitutionalism emerges as a tool to locate the legitimate use of the Security Council's power. Legality – the crown of legal constitutionalism – forms part of legitimacy but is not the whole

[3] See, 'Note by the President of the Security Council' (26 July 2010) UN Doc S/2010/507. See, further, UN Doc S/PV.6870 (26 November 2012) at 16: Mr Lahar, the permanent representative of South Africa acknowledged that '[t]he consistent implementation of its provisions must therefore remain central to the Council's work for ensuring greater accountability'.

part. By elevating the concept of legitimacy over legality, it is argued that a political constitutionalist lens might best accommodate the three dimensions of the Security Council's accountability deficit. To show this, the first section of this Chapter identifies a number of elements that qualify political constitutionalism are quintessentially 'political'. The subsequent sections mirror Chapter V, in that they seek to apply the principles of political constitutionalism to the dimensions of accountability.

1. What is Political Constitutionalism?

1.1. Political Constitutionalism and Constitutional Pluralism

Before unpacking the principle elements of political constitutionalism, it is first necessary to distinguish it from the distinct concept of constitutional pluralism, which has been invoked favourably in recent years. Nico Krisch's *Beyond Constitutionalism: The Pluralistic Structure of Post-National Law* currently stands as the strongest rejection of the prevailing trajectory of global constitutionalism literature.[4] One of the most fundamental tenets of legal pluralism is its rejection of hierarchy.[5] In this sense, pluralism provides a compelling bulwark against global legal constitutionalism. The pluralist perspective would, for example, reject the legal constitutionalist preference to hold the Security Council to account through judicial review.

Nico Krisch identifies the current debate over whether 'freedom is best promoted by subjection to clear rules or by participation and deliberation over the content of the law'.[6] He associates the former with constitutionalism and the latter with pluralism. He suggests that the promotion of the rule of law is but one of a number of ways to realise 'freedom', rather than 'a good in itself',[7] and that the rule of law 'overstates the degree to which law typically achieves certainty and predictability, and it exaggerates the place of the rule of law … relative to other political values'.[8] The pluralist approach, similar to political constitutionalism, would be extremely sceptical towards any suggestion that some form of legal meta-rationality can be invoked to

[4] Nico Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (2011). See, further, Nico Krisch, 'Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space' (2011) 24 *Ratio Juris* 386; cf Peers Zumbansen, 'Transnational Legal Pluralism' (2010) 1 *Transnational Legal Theory* 141.
[5] Ibid 103.
[6] Ibid 281.
[7] Ibid 282.
[8] Ibid 285.

constrain the Security Council. In this sense, political constitutionalism begins from a similar starting position to pluralism. Whereas to Krisch, constitutionalism is associated with depoliticisation, and the desire 'to tame politics' through legal rules, pluralism is about political deliberation. This is the point that democratic theorists make about the value of deliberation: it is precisely because societies are pluralistic, and few values are 'self-evident', that democratic deliberation is necessary.[9]

Krisch's pluralist account takes this a step further. He suggests that 'there is no common legal point of reference to appeal to for resolving disagreement; conflicts are solved through convergence, mutual accommodation—or not at all'.[10] Under the conditions of pluralism, there is no 'single decision-maker' applying 'overarching conflict rules', who will have the final word on the legality or legitimacy of a decision.[11] It is in this context that Loughlin has categorised constitutional pluralism an oxymoron.[12] Loughlin rejects the idea of competing constitutional claims of equal value as flawed by 'the fallacy of equivalence in which all species of law (all normative orders) are assumed to possess a similar status and authority'.[13] As such, pluralists give up precisely where an answer is most needed: pluralism is unable to adequately address the problem of what happens when conflict cannot be prevented or solved. In this respect, in his view, the normative claim that the answer ought to be left open is flawed: in fact, the question of final authority is never left open.[14] It seems difficult to imagine how legitimate decisions should emanate from uncoordinated processes of mutual contestation, unpredictable not only in a substantive but also a procedural sense. It is one thing to leave substantive outcomes open to contestation, but quite another to leave the processes through which such contestation and deliberation is held ill-defined, and therefore devoid of any legitimating criteria. It is because our conceptions of the good differ; that is, the inherent plurality of values

[9] Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press 2011) 25.
[10] Krisch (n 4) 69.
[11] Ibid 296.
[12] Martin Loughlin, 'Constitutional Pluralism: An Oxymoron' (2014) 3(1) *Global Constitutionalism* 9.
[13] Ibid 17.
[14] Alexander Somek, 'Monism: A Tale of the Undead', in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 346; cf Miguel Poiares Maduro, 'The Moral Point of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 73, whose response would seem inadequate: 'it is enough to state that one of the purposes of constitutional pluralism is precisely to legitimate leaving that question open and that, at an empirical level, the fact that the question remains open is a simple description of the constitutional status quo … only serves to reinforce the value of constitutional pluralism'.

in international society, that we need acceptable procedures for conflict resolution.[15] In this sense, it is difficult to square this conception of legal pluralism with the concept of accountability, irrespective of whether we frame the latter through a legal or a political lens.

It is submitted that, instead, the debate over the merits of the rule of law versus democratic deliberation, as identified by Krisch, represents both the dividing line between legal and political constitutionalism *and* the current state of the debate on Security Council accountability.

1.2. The 'Political' in Political Constitutionalism

In the context of comparative constitutional theory, Martin Loughlin suggests that 'everywhere and without exception, the 'executive' exercises a greater power than any reading of the constitutional texts would suggest', and that this 'presents a conundrum'.[16] This resonates with the significant expansion of the Security Council's enforcement powers since the end of the Cold War. It is this very 'conundrum' which has given rise to accountability discourse. Loughlin usefully articulates the normative emphasis of global liberal-legal constitutionalism, which is presented as a solution to the conundrum, and opens up space to problematise this emphasis:

> Constitutional legalists see this phenomenon as an abuse that must be curtailed by a more assertive use of law to curb executive action. But is it possible that their analyses are mistaken? Rather than using the document to draw conclusions about the activity, should we not start with the character of the activity and then derive conclusion about the nature and function of the document?[17]

This political, or, indeed, 'functional' perspective on constitutionalism holds particular value for international institutional law, as it provides something of a bulwark against global trends

[15] See, eg, Martin Loughlin, 'Constitutional Pluralism: An Oxymoron?' (2014) 3 *Global Constitutionalism* 9. On the other side of the spectrum, cosmopolitan theories suggest taking the individual as the be-all and end-all of collective self-determination. However, this might appear to put the cart before the horse, in the sense that it belies the position of states as the primary site of authority in international law. See, eg, Daniele Archibugi and David Held, *Cosmopolitan Democracy: An Agenda for a New World Order* (Polity Press 1995); Matthius Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 258.
[16] Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2004) 47.
[17] Ibid.

towards judicialisation.[18] Modern ideas of political constitutionalism can be seen to derive from the work of John Griffith.[19] To Griffith, the 'concept of law' was not an inherently 'moral concept'; instead, a law was a 'political act', a statement of a 'power relationship'.[20] In this general framework, 'Law is not and cannot be a substitute for politics', in fact, 'law is politics carried on by other means'.[21] Interestingly, this 'first wave' of political constitutionalism has been explicitly described as the 'functionalist wave',[22] For Griffith, the liberal's approach to the constitution 'looks first to the individual and seeks to protect him and his 'rights'' from the tumult of politics.[23] Yet because conflict is inevitable – because disagreement *about* rights (which rights are to be protected, to what extent, in what circumstances, with what exceptions, trumping which others in the event of a clash) is itself a political disagreement;[24] because statements of rights are so abstract as to restate political conflict whilst posing as its resolution,[25] because rights are but political claims to be considered alongside the claims of others – any project which seeks to contain political conflict by the means of entrenched, and therefore supposedly apolitical, legal rights will succeed only in displacing political decision making from those institutions that have been conferred that very power.[26] The fiction of legal constitutionalism is that normative conflict ought to be contained, and can be contained, by law.

Of course, law and politics should not be viewed as distinct realms, but rather as structurally coupled systems.[27] Law is both the product of political activity and *also* the organiser of, and (potential) limit on, political action. In the words of John Griffiths, political constitutionalism 'is instantiated in institutions established by law. It operates within a framework established by law, and through procedures established by law'.[28] Martin Loughlin is correct that it 'makes no

[18] See, eg, Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization* (Oxford University Press 2002); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004); Anne-Marie Slaughter, 'Judicial Globalization' (2000) 40 *Virginia Journal of International Law* 1103; Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191.
[19] See, for the seminal articulation, John Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1.
[20] Ibid 19.
[21] John Griffith, 'The Common Law and the Political Constitution' (2001) 117 *Law Quarterly Review* 42, 59.
[22] Marco Goldoni and Chris McCorkindale, 'The Three Waves of Political Constitutionalism' (9 January 2018). Available at SSRN: https://ssrn.com/abstract=3098798 or http://dx.doi.org/10.2139/ssrn.3098798
[23] John Griffith, 'The Brave New World of Sir John Laws' (2000) 63 *Modern Law Review* 159, 176.
[24] Marco Goldoni and Chris McCorkindale, 'The Three Waves of Political Constitutionalism' (n)
[25] Griffith, 'The Political Constitution' (n 20) 14.
[26] Ibid 16-17.
[27] Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16(2) *Indiana Journal of Global Legal* 397, 400, 407-9.
[28] Mark Tushnet, 'The Relationship between Political Constitutionalism and Weak-Form Judicial Review' (2013) 14 *German Law Journal* 2249, 2250.

sense to commence an inquiry into the idea of public law on assumptions … that the political and the legal are contrasting modes of discourse'.[29] The inter-relationship takes on a different dimension, however, at the level of international law, considering the indeterminate and decentralised nature of the system.[30] The same inter-relationship is at play in relation to the Security Council, as international law 'constitutes, maintains, operationalises and mobilises' the Council's competences under Chapter VII. However, as Tsagourias and White note, that does not alter the fact that 'law is the product of political choices and preferences as to how collective security as an order should be constituted and should function in order to attain its goal, or that law is an instrument to implement those prior choices and preferences'.[31] The functionalism of the 'first wave' is, therefore, to be seen in the stripping away of legal fictions – that this or that right is so fundamental as to be beyond disagreement; that judges are neutral arbiters of disputes and not themselves political actors; that in the rule of law is to be found the 'ultimate controlling factor' of our constitution – in order to present the realities of political power.[32]

1.2.1. Four Senses of the 'Political'

This section articulates four senses of the political that underlie the claims of political constitutionalism.[33] First, greater emphasis on political constitutionalism may offer a response to what Jeremy Waldron terms 'the circumstances of politics'. Waldron refers to the 'felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be'.[34] The 'circumstances of politics' speak directly the trend toward ambiguity in

[29] Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2004) 2; Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 OJLS 157, 169: 'law and politics collide and combine in a dazzling variety of (not always compatible) ways'.

[30] Wayne Sandholtz and Christopher A Whytock, 'The Politics of International Law' in Wayne Sandholtz and Christopher A Whytock (eds), *Research Handbook on the Politics of International Law* (Edward Elgar 2017) 1: 'The domain of politics and the realm of law are so intermeshed that any attempt to locate the boundary between them would be fruitless'.

[31] Nicholas Tsagourias and Nigel D White, *Collective Security: Theory, Law and Practice* (Cambridge University Press 2013) 30.

[32] McCorkindale and Goldini (n 24) 'Three Waves'.

[33] It draws heavily on Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 5-7.

[34] Jeremy Waldon, *Law and Disagreement* (Oxford University Press 1999) 103. Bellamy ibid 5 refers to 'circumstances where we disagree about both the right and the good, yet nonetheless require a collective decision'. Although not explicitly drawing the link to Waldron or Bellamy, Sandholtz and Whytock have recently expressed a similar sentiment specifically in relation to international governance systems. Wayne Sandholtz and Christopher A Whytock, 'The Politics of International Law' in Wayne Sandholtz and Christopher A Whytock (eds), *Research Handbook on the Politics of International Law* (Edward Elgar 2017) 2-3: 'Governance systems are social

Security Council resolutions. In relation to Resolution 2249 (2015) in particular, permanent members of the Security Council felt an obligation to send a powerful message in response to a serious terrorist attack against a permanent member. However, the political context; that is, the longstanding paralysis over the question of forcible measures of the territory of Syrian, meant that an unambiguous authorisation was a political impossibility.[35]

Security Council stalemate in relation to the threat posed by ISIL chimes with Loughlin's definition of politics itself: 'politics must concern itself with the business of making choices between rival, sometimes incommensurable, goods and in circumstances for which there is no overarching rational or objective standard or principle for resolving that dispute'.[36] Political constitutionalism thus offers a basic framework for resolving disagreements but, importantly, it is a framework that is also the subject of political debate. Consequently, rather than conceptualising the Charter as 'the constitution of the international community',[37] containing the hierarchically superior basic norms of the international legal order, through a political constitutionalist lens, the Charter instead offers a basic framework for resolving political disagreements. In other words, the Security Council is reframed as the legitimate forum to conduct political debate about how best to fulfil the principal aim of the United Nations: the maintenance of international peace and security. Such a framework is necessary for the naturally pluralistic structure of the Security Council. According to Shklar's classic formulation:

> To show that justice has its practical and ideological limits is not to slight it … The entire aim is rather to account for the difficulties which the morality of justice faces in a morally pluralistic world and to help it recognize its real place in it – not above the political world but in its very midst.[38]

In a second sense, political constitutionalism is political in that it is concerned with the political system rather than the legal system, and in particular with the ways that political power is organised and divided. The emphasis on the political relates to the republican tradition and its

mechanisms for constructing rules and for applying them to concrete situations, typically with the aim of facilitating or guiding collective action'.

[35] See, further, chapter 1, section 4.3.

[36] Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart 2000) 123-4.

[37] Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529.

[38] Judith Shklar, *Legalism: Law, Morals and Political Trials* (1986) 122-123.

emphasis on self-government, on the one hand, and the balance of power, on the other, as mechanisms to overcome domination through the arbitrary rule of the permanent members of the Security Council.[39] Republican theory shows well the distinction between prospective accountability, which is linked to the principles of participation and transparency, and retrospective accountability, should the Security Council abuse their power. Third, it draws on work in the field of public law political science, sometimes referred to as the field of 'political jurisprudence',[40] in that political constitutionalism see law 'as functioning as politically as democratic politics'.[41] Locating the concept of the political as an autonomous activity has been closely associated with the work of Carl Schmitt. To Schmitt, political action is founded on the distinction between 'friend' and 'enemy'. The friend-enemy distinction is based on the conviction that conflict is a primordial condition. Schmitt's contention is that at the core of the concept of the political lies 'the most intense and extreme antagonism, and every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping'.[42] In other words, 'the ever present possibility of conflict', even 'armed combat'.[43] In an important move, Schmitt also links his concept of the political to international law. Of course, the management of armed conflict is the central rationale underpinning the Security Council.

Categorising an autonomous space for 'the political' is also a central aspect of Loughlin's thesis. Loughlin argues that 'public law forms a distinctive aspect of political practice',[44] To Loughlin, 'in a world comprising a multiplicity of moral maps … it is the inevitability of clashes between these that determine the political'.[45] Liberal-legal constitutionalism tends not to endorse decentralisation, diversity, and the idea of constitutional meaning being derived

[39] Bellamy (n 33) 5.
[40] Bellamy attributes this school of thought to Michael Shapiro, 'Political Jurisprudence' (1964) *52 Kentucky Law Journal* 294. See, more recently, Martin Loughlin, *Political Jurisprudence* (Oxford University Press 2018) 8: Public law was formed in the modern world as the jural coding of an autonomously-conceived political domain'; ibid 21: 'Public law as political jurisprudence operates to ensure that the autonomously conceived domain of the political is able to maintain and enhance its authority'.
[41] Bellamy (n 33) 5.
[42] Carl Schmitt, *The Concept of the Political* (first published 1932, George Schwab trans, University of Chicago Press 1996) 29.
[43] Ibid 32; see further, Michael Oakeshott, *Rationalism in Politics and Other Essays* (Methuen Publishing 1962) 127: Oakeshott reverts to an analogy of sailing on a boundless and bottomless sea. The enterprise of political activity, according to this analogy, 'is to keep afloat on an even keel, the sea is both friend and enemy; and the seamanship consists in using the resources of a traditional manner of behaviour in order to make a friend of every hostile occasion'
[44] Loughlin, *The Idea of Public Law* (n 29) 32.
[45] Ibid 34, Loughlin ascribes this view principally to Carl Schmitt: 'Moral values are certainly not irrelevant in politics. The point that Schmitt impresses upon us is that they are not authoritative'.

from the competing political values being held in tension through a taut institutional configuration'.[46] In the international context, this is problematic from an empirical perspective. International law is a decentralised order. Norms are derived from political contestation. Giacinto della Cananea notes that 'recent studies about public law values share in common with an apparently diverging theory of Carl Schmitt; namely, the dimension of conflict'.[47] Disagreement, and thus conflict, are central tenets of 'the political'. According to Loughlin, 'politics must concern itself with the business of making choices between rival, sometimes incommensurable, goods and in circumstances for which there is no overarching rational or objective standard or principle for resolving that dispute'.[48] It is inevitably the case that values come into conflict with countervailing values, with the consequence that it is very hard for legal scholarship to keep itself distinct from politics. As Cananea shows '[e]ven the attempt to identify and propose 'objective' values is doomed to stifle conflict because any theory that proposes a system of values will regard any other as false'. [49] Any attempt to identify unproblematic universal values is doomed to fail. And this is doomed to continue in a cyclical fashion, for we always return to 'the conflicts where we began'. According to Griffith, *'politics is what happens in the continuance or resolution of those conflicts.* And law is one means, one process, by which those conflicts are continued or may be temporarily resolved. No more than that.'[50]

Finally, political constitutionalism may take on a more normative dimension. Specifically 'it shows how real democratic processes work in normatively attractive ways so as to produce the constitutional goods'.[51] To McCorkindale and Goldoni, 'the seeming hegemony of [legal models] of constitutionalism among contemporary lawyers and political scientists has produced from political constitutionalists a reaction against the delegation of important decisions to non-political institutions and an obsessively court-centred scholarship'.[52] The defining element of the second wave of political constitutionalism literature, therefore, is that

[46] Martin Loughlin, 'What is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism* (Oxford University Press 2010) 61.
[47] Giacinto della Cananea, *Due Process of Law Beyond the State: Requirements of Administrative Procedure* (Oxford University Press 2016) 87-88. See, specifically, Carl Schmitt, *The Tyranny of Values* (1967, Simona Draghici trans, Plutarch Press 1996).
[48] Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oxford: Hart, 2000) 123-4.
[49] Cananea (n 47) 87.
[50] John Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1, 20 (emphasis added).
[51] Bellamy (n 33) 5.
[52] Marco Goldini and Christopher McCorkindale, 'A Note from the Editors: The State of the Political Constitution' (2013) 14 *German Law Journal* 2103, 2103.

it seeks to provide 'an account of politics as an activity to be celebrated and performed rather than feared and closed off'.[53]

The central question, however, is in whose interests is the 'political constitution' to serve. This question can be reframed along the following lines: *to who* should the Security Council 'give an account' and, ultimately, be 'held to account'? Considering the sociological nature of accountability, it is submitted that the concept of constituent power might be a useful conceptual frame through which to address this question. Political constitutionalism maintains that the relationship between the constituent power and power once constituted remains in a state of flux. Therefore those 'constituents' (member states) who originally delegated authority to the Security Council might be the most appropriate actors to serve as the accountability forum. This signifies an important critical departure from the legal constitutionalist lens, which holds judicial institutions as the most appropriate accountability forum.

1.3. Political Constitutionalism and Constituent Power

Jeremy Waldron asks, 'what do constitutions do that constitutionalists downplay?' His answer is that 'first and foremost they empower'.[54] Constitutions establish institutions that allow people 'to cooperate and coordinate to pursue projects that they cannot achieve on their own'.[55] Constitutions also invest institutions with public authority. Crucially, this foundational moment in which the constituents exercise their considerable power to constitute an institutional actor is not additional, or even only complimentary, to the conventional understanding of constitutionalism as limiting device, it comes 'first and foremost'.

Walker suggests that implicitly uniting the two mindsets (global constitutionalism advocates and sceptics) is a sense, corroborated by the etymology of the constitutional idea. He states that

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[53] Marco Goldini and Christopher McCorkindale, 'A Note from the Editors: The State of the Political Constitution' (2013) 14 *German Law Journal* 2103, 2104. To be accurate, the relevant reflection on politics comes from more traditional versions of republicanism. See, seminally, Hannah Arendt, *The Human Condition* (University of Chicago Press 1958); Bernard Crick, *In Defence of Politics* (first published 1962, Bloomsbury 2013); see, further, Marco Goldini and Christopher McCorkindale, 'A Note From the Editors: The State of the Political Constitution' (2013) 14 *German Law Journal* 2103, 2109, who describe the emergence of 'a full-fledged constitutional *theory* capable of standing as an alternative to the liberal-legal paradigm – a turn, one might say, from the political constitution to political constitutionalism'.

[54] Jeremy Waldron, 'Constitutionalism: A Skeptical View' in Thomas Christiano and John Christman, *Contemporary Debates in Political Philosophy* (John Wiley and Sons 2009) 265, 273.

[55] Ibid.

constitutionalism serves 'the meta-political function of shaping the domain of politics broadly conceived—of literally 'constituting' the body politic.[56] More expansively, constitutionalism in this deepest meta-political sense may be understood:

> [a]s referring to that species of practical reasoning which, in the name of some defensible locus of common interest, concerns itself with the organisation and regulation of those spheres of collective decision-making deemed relevant to the common interest in a manner that is adequately informed by the common interest.[57]

The republican notion of 'constituent power' provides the foundational basis of the constitutionalism. As such, it also provides the conceptual starting point for Security Council accountability. The essential question can be framed: who should the Security Council be accountable to? The answer to this question, it is submitted, is the individual states of the United Nations, as it is states who serve as the *pouvoir constituant* in international law. The subsidiary question, which emerges from this essential question, is: on what theoretical basis should the Security Council be accountable to member states of the United Nations? The answer to this question is because individual states remain the original architects of international institutions, and international institutions rely on states for enforcement of their decisions. Commentators are in agreement that constituent power can only really be exercised through representation.[58] The idea of representation manifests clearly in Article 24(1), according to which the Security Council acts on behalf of the entire corpus of members of the UN. It has been argued in some quarters that, as a natural corollary to this fact, member states maintain 'a right of supervision on how this responsibility is exercised on their behalf'.[59]

Another consequence of this juridical orientation, and the narrowing down of the debate to a struggle about the relative appropriateness of the Security Council or the International Court of Justice (and other international, regional and domestic courts), is the insinuation 'that constitutional change is, and should be, simply a war of the gods, fought out by representative

[56] Neil Walker, 'Beyond the Holistic Constitution?' in P Dobner and M Loughlin (eds) *The Twilight of Constitutionalism?* (Oxford University Press 2010) 291, 296.
[57] Ibid 296
[58] See, eg, Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2003); Nico Krisch, 'Pouvoir Constituant and Pouvoir Irritant in the Postnational Order' (2016) 14(3) *International Journal of Constitutional Law* 1, 27.
[59] Eric Suy, 'The Role of the United Nations General Assembly' in Georges Abi-Saab (ed), *The Changing Constitution of the United Nations* (British Institute of International and Comparative Law 1997) 55, 64.

(or not so representative) institutions'.[60] It misses a fundamental, foundational, aspect of constitutionalism; that is, the notion of constituent power. Global constitutionalist literature largely 'underestimates the continuing role of constituent power, largely because it looks at it through a narrow lens'.[61] Nico Krisch has described as 'foundational constitutionalism'. That is:

> [A] tradition that places particular emphasis on the idea of a constitution as 'founding' and comprehensively organising the public power existing in a polity. A constitution in that sense … represents a tool not only to establish limits to public institutions but also to realise self-government by defining the extent and procedural rules for the exercise of (delegated) governmental powers. Outside that framework, public power can no longer be legitimately exercised; all such power has to be traceable to the original *pouvoir constituant* via the constitution.[62]

A recurring critique of liberal-legal constitutionalism is that it asserts a concept of constitutionalism as a set of rational principles. Contrasting to the 'foundational' approach, this 'freestanding' approach depicts accountability as 'paradigmatic of a broader phenomenon of cosmopolitan constitutionalism, based on individual rights guaranteed through a transnational rule of law'.[63] It is freestanding in the sense that it is built on an ideal construct of law – whether as a model of rules or a model of rights – and constitutionalism seeks 'to reinterpret the world in accordance with its precepts'.[64] Liberal-legalism successfully evades a conception of the common good by privileging restraints on the exercise of (constituted) power, in the name of the rule of law and of the protection of individual rights. From this perspective, the foundational constitutional question is bypassed by implying that there is already a fully-fledged global constitution (or global constitutions) 'because it has a strong, if imperfect, set of legal guarantees of private liberty'.[65] Christopher Thornhill articulates this very well:

> In the contemporary political system constituent power has been supplanted by *rights* as the dominant source of legitimacy; this shift underlies the changing political form of contemporary society. Transnationally enforced rights norms now increasingly pre-define the constitutional conditions for the legitimate exercise of power, and it is from norms in respect of rights, not from any primary sovereign

[60] Stephen Tierney, 'Whose Political Constitution? Citizens and Referendums' (2014) *German Law Review* 2185, 2186.
[61] Krisch, 'Pouvoir Constituent' 7.
[62] Nico Krisch, 'Global Administrative Law and the Constitutional Ambition' in Petra Dobner and Martin Loughlin (eds) *The Twilight of Constitutionalism* (Oxford University Press 2010) 252.
[63] Michael Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76(2) *Modern Law Review* 191, 191.
[64] Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2003) 28.
[65] Wilkinson (n 63) 193.

> act of constitution making, that the contemporary political system generally derives its authority and its self-explanation.[66]

In this context, accountability relates to limiting the power of the governmental authority according to certain constitutional norms. These norms acquire the status of fundamental law not because they have been authorised by a 'constituent power', but because of the self-evident rationality of their claims.[67] Political constitutionalism, on the other hand, approaches the question of accountability as if the relationship between the governmental authority and constituent power is conditional on the continued support of the constituent power: 'public office is held on trust and those who occupy positions of political power need to be subjected to political scrutiny'.[68] The Security Council's authority, once constituted, should not be closed off from scrutiny. In this light, Keith Ewing praises the political constitution's flexibility as its greatest virtue.[69] He refers to the 'openness of the political constitution', which is able 'to provide for popular demands to be met without formal limit'.[70]

In the domestic sphere, constitutionalism rests on the principle that constituent power resides in the people, who delegate a limited authority to the government to promote the public good. Governors are presented as servants of the people, who are required to account for the powers entrusted to them. Governments, in Locke's words, are vested with 'only a fiduciary power to act for certain ends'.[71] The constitution, therefore, 'fixes the *primacy of the people* over their government'.[72]In constitutional theory, there is, therefore, a central distinction between the constituted power (the governmental authority) and the constituent power (traditionally deemed to be vested in the people). The premise that constituent power is the foundational idea underpinning constitutionalism can be found in the definition of the term 'constitution'. Constituent power is a concept that is irrevocably tied to the theory of political constitutionalism, for the latter's original premise is that *politics precedes law*.[73] As such, a

[66] Chris Thornhill, 'Contemporary Constitutionalism and the Dialectic of Constituent Power' (2012) 1(3) *Global Constitutionalism* 369, 375.
[67] Loughlin, 'What is Constitutionalisation?' (n 46) 61: 'the norms of right conduct prescribed in these texts acquire their authority from precepts of reason rather than approval of 'the people'.
[68] Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 *Oxford Journal of Legal Studies* 157, 174. This resonates with Onora O'Neill, *A Question of Trust* (Cambridge University Press 2002).
[69] Keith D Ewing, 'The Resilience of the Political Constitution' (2013) 14 *German Law Journal* 2111.
[70] Keith D Ewing, 'The Resilience of the Political Constitution' (2013) 14 *German Law Review* 2111, 2117.
[71] John Locke, *Two Treatises of Government* [1680] (Peter Laslett eds, Cambridge University Press 1988) 149 (cited in Loughlin, *The Idea of Public Law* (n 29) 46).
[72] Loughlin, 'What is Constitutionalisation?'(n 46) 49 (emphasis in original).
[73] Tsagourias and White (n 31) 31, reflect this sentiment in their work on collective security: to the extent that the interpretation of law is 'primarily effectuated in political arenas, political acceptance precedes legal acceptance'.

political constitutionalist lens encourages scrutiny into the original (political) act of constitution. Thornhill refers to the 'legitimating status of constituent power as an originating external source of law'.[74] The constituent power is the subject from whom the constitutional order originates in the first place. It concerns the constituency in whose name an institutional order is founded, but it goes deeper than simply identifying the interests served by an institution's policies. It is rooted in a functionalist perspective. The constituent power points, as Hans Lindahl notes, to the 'self-identity of a particular political association and ground the collective purpose and normativity of that order'.[75]

Translating constitutionalism to a post-state environment, however, immediately meets a significant conceptual hurdle. Constitutionalism has traditionally been associated with nation states not just because states have maintained a monopoly over public power, but because states offered the clearest manifestation of the idea of 'constituent power'. In seeking to transplant the notion of constituent power beyond the state, it is, indeed, tempting to seek to maintain the idea of constituent power as 'people power', as it manifests in many contemporary constitutions in the idea of 'We the Peoples'. Global constitutionalism, in this sense, is dependent upon analogy. The domestic analogy is natural, but potentially problematic. 'Analogies to domestic law are impermissible', Joseph Weiler once remarked, 'though most of us are habitual sinners in this respect'.[76] To Neil Walker, '[h]ow deep the analogy runs and what is lost − or gained − in translation from one context to another is rarely the subject of sustained analysis'.[77] To seek to translate the idea of constituent power in its entirety, that is, to locate international institutional authority within a conceptualisation of popular self-determination is ill-advised for three main reasons. First, it is too artificial; too much of a conceptual leap. States, not indivduals, established the United Nations and thus constituted the Council's power. In a very literal sense, while states participate in international law as

[74] Chris Thornhill, 'Contemporary Constitutionalism and the Dialectic of Constituent Power' (2012) 1(3) *Global Constitutionalism* 369, 374.

[75] John G Oates, The Fourth Face of Legitimacy: Constituent Power and the Constitutional Legitimacy of International Institutions (2016) 43(2) *Review of International Studies* 199, 207; see, further, Hans Lindahl, 'Constituent Power And Reflexive Identity' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2003)

[76] Joseph Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Heidelberg Journal of International Law* 547, 550; Thomas Poole, 'Sovereign Indignities: International Law as Public Law' (2011) 22(2) *European Journal of International Law* 351: 'Like reaching for that extra piece of chocolate, we can't resist resorting to analogies when it comes to thinking about international law. We know we shouldn't, but we just can't help ourselves'.

[77] Walker, 'Beyond the Holistic Constitution' (n 56) 294. On the idea of constitutional translation, see Barry Freedman and Cheryl Saunders, 'Symposium: Constitutional Borrowing; Editors' Introduction' (2003) 1 *International Journal of Constitutional Law* 177.

representatives of their people, this is too indirect to constitute popular self-determination.[78] Second, to suggest otherwise would be to rewrite the whole architectural design of the international legal order (in an explicitly Kantian 'cosmopolitan' manner). Christine Schwöbel, for example, states that 'the notion of cosmopolitanism can be described as political constitutionalism aiming to constitute global democracy'.[79] David Held claims that the 'cosmopolitan model of democracy' is a necessary instrument to ensure the accountability of the related and interconnected power systems of the world.[80] Cosmopolitanism manifests, first and foremost, in the idea of international community. 'Cosmopolitanism is commonly based on the assumption that all people belong to a universal moral community'. All these ideas come together, to Byers, in the facts that 'international society is today more and more defining itself as universal, at least in terms of its fundamental, constitutional rules'.[81] However, there is an important difference. Cosmopolitanism has as its *raison d'etre* the establishment of a global political community, which is constituted of and by a society of free and equal individuals. This type of analysis postulates 'the existence of an 'international community' as a surrogate for 'the people' and treats the legal framework through which this community acts as its constitution'.[82]

Finally, if constituent power is linked to theories of democracy, according to one view, the very idea of democratisation within the Security Council is problematic: 'Democratization would dictate that all permanent members are democratic states and that work of the Security Council is transparent at all its stages'.[83] Of course, neither of these conditions is satisfied at the present time. China, for example, is a non-democratic permanent member with the right of veto. But this does adopt a rather superficial view of democratisation. If democracy means 'the will of the people shall be the basis of the authority of government', as embodied in Article 21 of the Universal Declaration of Human Rights, then one state, one vote would not make the Security

[78] See, eg, Thomas Cottier and Maya Hertig, 'The Prospects of 21st Century Constitutionalism' (2003) 7 *Max Planck Yearbook of United Nations Law* 261, 287-93, who address the point that state constitutionalism is authorised by 'the people' but claim that this concept, being ethnic or cultural in character, ought not simply to be transcended: 'This is not a constitutional model upon which the future can build'.
[79] Schwöbel-Patel 27.
[80] David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press 1995) 267.
[81] Michael Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 *Nordic Journal of International Law* 211, 236.
[82] Loughlin, 'What is Constitutionalisation?' (n 46) 64-5.
[83] Maria Mikhailitchenko, 'Reform of the Security Council and Its Implications for Global Peace and Security (2004) 7 *Journal of Military and Strategic Studies* 1, 10.

Council more democratic *per se*.[84] Finally, while reference to 'international community' has been popular since the mid-1990s, 'such references serve primarily to illuminate the purpose, beneficiaries and moral value of particular rules, not to designate the jurisgenerative power behind them'.[85]

The main obstacle to the realisation of a fully-fledged deliberative democracy at the international level is the absence of an 'international demos'.[86] This feeling refers to the '*Gemeinsamkeitsglaube'*, or 'feeling of collective identity', famously invoked by the German Constitutional Court in its Maastricht decision:

> A democratic polity depends on a sense of social cohesion, shared destiny and collective self-identity … [which in turn] is conditioned on some though not necessarily all of the following elements: common language, common history, common cultural habits and sensibilities, common ethnic origin, common religion.[87]

As noted above, the turn to constitutionalism involves somewhat creative analogical reasoning between the domestic and the international. In many ways, it is difficult to translate the national to the international in this context. International society is altogether different – larger, more fragmented, lacking a 'demos'. The public in the original, nation-state-centred, version of constitutional theory is the state. Its citizens exercise collective self-determination. Beyond the state, there is no defined community which would constitute the subject of collective self-determination and legitimise international public authority.[88]

International society is said to lack the 'perception of connectedness', which in turn presupposes a certain feeling of identity among the members of the community. According to Krisch, 'The global polity is not capable of instituting structures of democratic participation nearly as thick and effective as those possible on the national level'.[89] There are two principal reasons why this is the case. First, the Security Council is 'too far removed from individuals,

[84] Robert Dahl makes this and other points in expressing scepticism about the possibility of democratising international organisations in 'Can International Organizations Be Democratic? A Skeptic's View', in Ian Shapiro and Casiano Hacker-Cordón (eds), *Democracy's Edges* (Cambridge University Press 1999).
[85] Krisch, 'Pouvoir Constituent' (n 61) 15.
[86] Weiler, 'Geology' 560.
[87] *Brunner v European Union Treaty* (1993) BVerfGE 89 (cited in Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press 2011 18).
[88] Goldmann 64.
[89] Krisch, 'Pouvoir Constituent' (n 61) 12.

and intergovernmental negotiations do not come with the deliberative structures necessary for effective public involvement'. Second, the Security Council faces 'serious limits of communication across cultural, linguistic, and political boundaries'.[90]

The first option would be to claim that the *material* rationale of constituent power can indeed be detached from the state. Such multiplicity is not new in itself. The 'nation', or even the people, have not always been uncontested candidates for constituent power. The 19th century, for example, saw a prolonged competition with monarchical claims.[91] The point is not to deny that constitutionalism has taken on a specific meaning in the context of the nation state, but to show that its roots pre-date Westphalia. We, therefore, need to identify a familial association between the two, which I argue is found in the distinction between constituent and constituted power (generation and constraint).

The second option relates to the fact that in either context, the idea of a personified constituent power is something of a legal fiction. Anne Peters suggests that the claim that the constitution is 'owned' by the people 'risks overstating the importance of irrational and mythological foundations of constitutional law'.[92] However, this seems to miss the fact that the very idea of constituent power remains an abstraction even in terms of domestic constitutions. Constituent power has been described as a 'purely symbolic and retrospectively instituted collective entity'.[93] The social contract is such a potent and versatile tool of political philosophy precisely because it is treated as being entirely an exercise of the imagination.[94] The analogy that states exercise constituent power in international institutional law is not necessarily any more of an abstraction than in the domestic context. In fact, the analogy reflects a rather conventional view of international law which holds states are the primary actors.

1.3.1. Member States and Constituent Power

However, it might be argued that this close relationship of constitutionalism and statehood applies only to the states' *internal formation* and is absent in the sphere of their *external*

[90] Ibid 12.
[91] Ibid 12. See, on this point, Walker, 'Beyond the Holistic Constitution' (n 56), who discuss the notion of medieval constitutionalism.
[92] Peters, 'The Merits of Global Constitutionalism' (n 27) 608.
[93] Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2003) 2.
[94] Ibid 2.

relations. Due to their territorial character, states are political entities which necessarily exist as a plurality. They interact on the basis of mutual independence and equality and form an unorganised international society, which Hedley Bull rightly qualified as an anarchical society. Independence is a synonym for sovereignty or, for that matter, for sovereign equality, one of the basic principles of the Charter (Article 2, para 1).[95] Thus, interpersonal reciprocity at the domestic level is translated to international reciprocity beyond the state. While I argue that a formalist, positivist, Westphalian interpretation of legal rules is the only logical option; that is, one which priorities nation-states and state concept, it is interesting to note that in any event Krisch shows through empirical data that the nation-state also remains the primary, though no longer the sole, focus of political loyalties.[96]

Thus, we might be tempted by a model of constituent power by analogy. This analogy holds that as states are the constituents both of international institutions and are the principal actors in international law generally (constituency) they exercise constituent power. This would be the only way to accommodate this concept within conventional international legal paradigms. The individual model holds that 'as individual humans are the subjects of domestic law, so nation-states are the individual subjects'.[97] As Prandani suggests, [s]ubstantively, nation states remain the most significant hosts to constitutional discourses, institutions, and structures. Only by starting from the state is it possible to elaborate a new discourse'.[98] Thus, to Waldron, 'We are held in the grip of a picture that sees the relationship between national sovereigns and [international law] as exactly analogous to the relationship between individual citizens and national law'.[99] It is true that we are talking now about a government, but given that we have gone up a level, given that we are now in the international realm, it is often said that at the municipal level governments are just like individuals.[100] Indeed, all significant authors, Schmitt argued, from Hobbes to Leibniz to Kant, have claimed that in international law states live as

[95] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (first published 1977, Palgrave Macmillan 2012).
[96] Krisch, 'Pouvoir Constituant' (n 61) 17.
[97] Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?'(2011) 22(2) *European Journal of International Law* 315, 328.
[98] Riccardo Prandini, 'The Morphogenesis of Constitutionalism' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (Oxford University Press 2010) 309, 309.
[99] Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?'(2011) 22(2) *European Journal of International Law* 315, 327. Waldron directs us, on this point, to Rosalyn Higgins, 'Conceptual Thinking about the Individual in International Law', 24 *New York Law School Law Rev* (1978–1979) 11.
[100] Ibid 328.

'moral persons' in a state of nature, confronting one another as sovereign persons with equal legitimacy and equal rights.[101]

Indeed, Waldron's very attempt to test the hypothesis has found that the domestic analogy does not hold. Waldron's critique is that it misconstrues the dual function of states (the conventional *double functionaire* argument). But for the analogy to hold what we have to do is elevate the level of analysis – from state to international (intra-national to inter-national) *en tout*. That is, if reason that the position of the state in international law (or, specifically, vis-à-vis the international organisation) is analogous to the role of the individual in municipal law, then to complete the circle we also need to reason that the position of the international organisation (vis-à-vis its member states) is analogous to the role of the state in municipal law. That is to say, states delegate powers to an international organisation in much the same way as individuals delegate powers to the state in public law theory. Waldron's central critique is that states are already law-constituted entities. Considered in *both* its municipal aspect *and* in its international aspect, a state's sovereignty is an artificial construct, not something whose value – like that of the human individual – is to be assumed as the first principle of normative analysis.[102] The assertion that, in the eyes of international law, state sovereignty is really an artificial construct, is open to question. Even in Hedley Bull's *Anarchical Society*, for example, states maintain their sovereignty. In fact, it is that very sovereignty (and the absence of a global meta-sovereign) that permits states to conduct their interstate relations in any way it sees fit. Pre-international regulation, it was the fact of sovereignty, not in spite of sovereignty, that states felt justified in waging wars of expansion. The point is that the absence of international law does not mean the absence of sovereignty. The end of sovereignty would require more than the destruction of international law; it would require the destruction of the Westphalian model of independent territorial entities as global ordering device.

State sovereignty defines the characteristics of international law and, in turn, international law props up state sovereignty. But one does not require the other. That is, international law does not *create* sovereign states but emerges from a base presumption that states 1) exist and 2) are sovereign. In other words, contra Waldron, state sovereignty, like that of the human individual, is to be assumed as the first principle of normative analysis. It is worth zeroing in on Waldron's

[101] Carl Schmitt, *Nomos of the Earth in the International Law of Jus Publicum Europaeum* (first published 1950, Telos Press Ltd 2003) 147.
[102] Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law' (n 102) 328.

reasoning in a little more detail. He argues that, at the domestic level, the state is: 'a particular tissue of legal organization: it is the upshot of organizing certain rules of public life in a particular way. Its sovereignty is something made, not assumed, and it is made for the benefit of those whose interests it protects'.[103] However, this describes the position of international organisations in international law, so actually supports the argument of conceptual translation, as opposed to undermining it. Waldron concludes that states should not 'be regarded in the light of an anarchic individual, dragged kicking and screaming under the umbrella of law for the first time by some sort of international social contract'.[104] But this would seem to deny the fact that a great deal of constitutional scholarship holds that individuals are not dragged into constitutional arrangements, but, in the republican spirit of the American and French revolutions, play an active role in their very creation. Republicanism is, after all, underpinned by the idea of the collective common interest. Indeed, the common interests of states present the strongest argument in favour of post-states constitutionalism, as 'at the deepest level of meta-political inquiry, we cannot simply decide a priori to equate the common interest with the national or state interest, and so corroborate an initial theoretical preference for state constitutionalism'.[105]

Weiler asks us to think about 'alternative legitimating devices which would make up for the non-applicability of some of the classical institutions of democracy where that is not possible'.[106] According to Johnstone, 'analogous to the "demos" in a democratic society, the patterns of interaction and interdependence that emerge in and around the Security Council creates the conditions for reasoned exchange on matters of regional or global public policy'.[107] He continues, 'membership in an international organization leads to internalization of shared experiences and common understandings and – to the extent that continued membership is desired – cultivates an incentive to operate within and perpetuate the norms it embodies'.[108] But, as Krisch says, the Security Council's practice does not point to this constitutionalised unitary world state, through the operationalisation of an international rule of law, as global liberal-legal constitutionalism might hold:

[103] Ibid 328.
[104] Ibid.
[105] Walker, 'Beyond the Holistic Constitution' (n 56) 297.
[106] Joseph HH Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für Ausländisches* Öffentliches Recht *und Völkerrecht* 547, 561.
[107] Johnstone (n 9) 20; see, for an explicit argument the Security Council is an example for a new claim to global constituent power, Jean L Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press 2012) 281, 321.
[108] Johnstone (n 9) 20.

> It has justified its steps as a purposive interpretation of existing law, thus affirming in principle that it is operating within the bounds of delegation from states. It might have had recourse to the ambitious invocation of a constituent power in the preamble of the UN Charter – 'we the peoples of the United Nations' – but it did not do so and instead remained in an intergovernmental framework.[109]

Drawing on Krisch, the nature of the Council as an intergovernmental organisation, albeit a particularly idiosyncratic one, reminds us of the fact that within this intergovernmental framework the exercise of governmental authority remains qualified by its acceptance by the constituent power. Often this link between accountability and constitutionalism is implicit, but Loughlin has made it explicit: 'Constitutionalism rests on the principle that constituent power resides in the people, who delegate a limited authority to government to promote the public good. Governors are presented as servants of the people, who are required to account for the powers entrusted to them'.[110] The notion of constituent power, in turn, relates to both dimensions of accountability. It reflects the notion of 'giving an account' in that it establishes the discursive importance of the accountability relationship 'as a structure of justification'.[111] This resonates with Gunther Teubner's sociological reinterpretation of constituent power. Teubner emphasises the discursive value of the concept as a 'communicative potential, as social energy'.[112] The notion of constituent power elevates the first register of accountability: giving an account. It also reflects the notion of 'holding to account' as 'the aspiration of constituent power can have force as a 'critical sting' for current structures of global governance'.[113] The next section, as in chapter four, will assess the dimensions of accountability specifically through a political constitutionalist lens.

2. Transparency: Security Council Reform as Accountability Proposals

The High-Level Report highlighted it is critical that decisions, particularly those under Chapter VII, 'be better made, better substantiated and better communicated'.[114] The working methods of the Council have not kept pace with the quantitative and qualitative changes in Security

[109] Krisch, 'Pouvoir Constituent' (n 61) 16.
[110] Loughlin, *The Idea of Public Law* (n 29) 46.
[111] Ibid 24.
[112] Gunder Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012) 63.
[113] Krisch, 'Pouvoir Constituent' (n 61) 26.
[114] Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2 December 2004) UN Doc A/59/565, at para 205.

Council decision-making practice. A tangible illustration of this can be seen in the fact that the Council's working methods are still based on the 'Provisional' Rules of Procedure. As indicated in the title, the rules of procedures were initially envisaged to be an interim measure only. However, the rules have essentially now become permanent as the permanent membership especially has preferred to 'retain flexibility rather than to settle on a fixed, detailed set of procedures'.[115] The Security Council has been subject to a plethora of reform proposals and scholarly attention.[116] The following section distinguishes between five aspects of the reform proposals associated with the concept of accountability: representation, participation, deliberation, publicness and reason-giving.

2.1. Representation

To be sure, the Council's fifteen-member state composition does not reflect the interests or perspectives of the diverse international community of states today. The efforts to reinvent the Council, it has been suggested, 'largely made representativeness…a proxy for legitimacy'.[117] While it remains a closely contested issue driven by regional politics, the 'usual suspects' to be added in this reformed Council can be foreseen by virtue of their contribution to the United Nations, their economic and military power and their relative political influence. For Africa, the choice is split among South Africa, Nigeria, and perhaps Egypt; in Asia, Japan and India; in Europe, Germany appears as the only viable candidate, and, in the Americas, Brazil stands at the top of the list. As the representative of Germany has powerfully stated:

> [w]e will weaken the Security Council if we fail to adapt it to today's world. Together with our partners in the G-4 group, India, Brazil and Japan, Germany is prepared to assume greater responsibility. It cannot be that Latin America and Africa have no permanent seats on the Security Council or that dynamic Asia has only one seat. That does not reflect the realities of today's world, and it definitely does not reflect the realities of tomorrow.[118]

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[115] Daniel Moeckli and Raffael N Fasel, 'A Duty to Give Reasons in the Security Council: Making Voting Transparent' (2017) 14 *International Organizations Law Review* 13, 16.

[116] See, Peter Nadin, *Reforming the Security Council* (Routledge 2016); Sabine Hassler, *Reforming the UN Security Council Membership: The Illusion of Representativeness* (Routledge 2013); Dimitris Bourantonis, *The History and Politics of UN Security Council Reform* (Routledge 2004); Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer Law International 1998).

[117] Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press 2008 in ibid (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press 2008) 33.

[118] General Assembly Official Record (28 September 2012) UN Doc A/67/PV.15, at 16-17.

There are three main reasons to be sceptical of the disproportionate attention placed on the idea of representation. The first relates to the practical difficulty of implementing any reform proposal. Since its inception the Council has undergone reform only once. In 1963, the General Assembly voted to expand the Council from 11 to 15 members.[119] It would be very difficult, if not impossible, to formally amend the Charter again. Any change to the composition of the Council and its voting procedures would itself be subject to the permanent member veto.[120] To Dinstein, there have been 'many academic proposals to abolish the veto power. Such proposals remain an academic-and entirely moot-exercise. There is no indication whatever that the five permanent members might be willing to consider divesting themselves of the veto power'.[121] Second, the question of representation actually appears relatively superficial when we consider that states have tended 'to evaluate any reform proposal according to their own prospects of getting on [to the Security Council] permanently or, alternatively, more frequently'.[122] According to Edward Luck, the crux of the matter for individual states tends to be: 'who was putting forward the proposal, and what each group might be expected to gain or lose from it'. In other words, 'each state or group of states looked to its own national advantage'.[123] The third reason relates to the balance between representation and effectiveness.[124] As Edward Carr noted, as the Council of the League became more representative, it 'lost much of its effectiveness as a political instrument'. In reference to the League, Carr suggested that 'reality was sacrificed to an abstract principle'.[125] The drafters of the Charter thus 'explicitly rejected the notion that the Security Council should be representative, democratic, or equitable'.[126] The High-Level Report, for example, envisioned Security Council reform under a set of specific

[119] UNGA Res 1991 (XVIII), 'Question of Equitable Representation on the Security Council and the Economic and Social Council' (17 December 1963) UN Doc A/Res/1990.
[120] UN Charter (1945) art 108: 'Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council'.
[121] Yorum Dinstein, 'Sovereignty, The Security Council and the Use of Force', in Mary Ellen O'Connell, Michael Both and Natalino Ronzitti (eds), *Redefining Sovereignty: The Use of Force After the End of the Cold War: New Options, Lawful and Legitimate?* (Transnational Publishers 2005) 111, 117.
[122] Bourantonis (n 116) 8.
[123] Edward C Luck, 'Reforming the United Nations: Lessons from a History in Progress' (2003) 1 *International Relations Studies and the United Nations Occasional Paper Series* 1, 5.
[124] This balance is well-established in the literature. See, eg, W Michael Reisman, 'The Constitutional Crisis in the United Nations' (1993) 87 *American Journal of International Law* 83, 96.
[125] EH Carr, *The Twenty Years' Crisis, 1919-39* (2nd edn, Macmillan 1946) 29.
[126] Edward C Luck, 'The UN Security Council: Reform or Enlarge' in Paul Heinbecker and Patricia Goff (eds), *The United Nations in the Twenty-First Century* (Wilfrid Laurier University Press 2005) 143, 144.

goals.[127] First, reform should ensure the expansion of participation in the Council better includes members that contribute the most financially, militarily, or diplomatically.[128] However, the Report also acknowledged that Security Council reform should not compromise the effectiveness.[129] It is important, therefore, to move away from the idea of representation as an abstract principle and towards an understanding of the substantive values that the reform debate represents.

2.2. Participation

Political constitutionalism 'is based on an understanding of democracy which elevates participation and deliberation over mere representation'.[130] On the contrary, legal constitutionalism postpones, rather than encourages, concrete debates on concrete problems.[131] Mirroring this principle of political constitutionalism, the ILA Report identifies '[t]ransparency in both the decision-making process and the implementation of institutional and operational decisions' as the first 'principle of good governance'.[132] Importantly, the ILA acknowledges that the principles of good governance 'do not necessarily reflect a legal obligation … They are derived from common principles, objectives and notions related to the accountability' of international organisations.[133] These principles are, therefore, at home under the banner of political constitutionalism. Reflecting the move from representation to participation and deliberation, in his 'Agenda for Peace', former Secretary-General Boutros Boutros-Ghali advocated that 'democracy within the family of nations … requires the fullest consultation,

[127] UNGA, Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2 December 2004) UN Doc A/59/565
248-9.
[128] It may be possible to distinguish quantitatively between member states' contributions (although there will inevitably be controversy around the criteria used). See, eg, UNGA Committee on Contributions <http://www.un.org/en/ga/contributions/budget.shtml> It is, however, almost impossible in practice to differentiate qualitatively. For instance, the monetary contribution of Japan constituted 19.63% of the UN budget in 2001. At the same time India is one of the UN's largest contributors of peacekeeping troops. See, generally, Nadia Banteka, 'Dangerous Liaisons: The Responsibility to Protect and a Reform of the UN Security Council' (2016) 54(2) *Columbia Journal of Transnational Law* 383, 401: 'Determining which state is more appropriate to take a permanent seat in the UNSC can easily become a very tricky endeavor'.
[129] UNGA, Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2 December 2004) UN Doc A/59/565
para 248-9.
[130] Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 *Oxford Journal of Legal Studies* 157, 174.
[131] Peters, 'The Merits of Global Constitutionalism' (n 27) 403.
[132] International Law Association, 'Report on the Accountability of International Organisations' (Berlin Conference 2004) 8-9.
[133] Ibid 8.

participation and engagement of all States, large and small, in the work of the Organization'.[134] The Council's frequent recourse to Chapter VII has also become a transparency issue, in that some Member States have argued that if the Security Council imposes measures viewed as binding on all Member States, the Council must become more willing to listen to the viewpoints of all Member States.[135]

The tools for participation beyond the members of the Council are provided by the Charter. Article 31 of the Charter provides that non-Council member states '*may* participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected' (emphasis added). However, the emphasis remains on the Security Council to determine whether the interests of other states are specially affected and, crucially, invited participants are not permitted to vote.[136] Once invited to participate in the discussions of the Security Council, non-members may submit proposals and draft resolutions. However, these proposals and draft resolutions may be put to a vote only at the request of a representative on the Security Council.[137] Pursuant to Article 35(1), any Member may bring any dispute, or any situation referred to in the nature of Article 34 ('any situation which might lead to international friction or give rise to a dispute') to the attention of the Security Council. Having done so, the Security Council has confirmed, pursuant to Rule 37 of its Provisional Rules of Procedure, that the non-Council member '*may* be invited, as a result of a decision of the Security Council, to participate, without vote, in the discussion' (emphasis added). In both cases, however, reference to 'may', implies that this is not mandatory – the Security Council is under no binding obligation under this provision.

Contrastingly, in accordance with Article 32 of the Charter, if a non-Council member state 'is a party to a particular dispute under consideration', they '*shall* be invited to participate, without vote, in the discussion' (emphasis added). Reference to 'shall' implies that this 'involves an obligation of the Council'.[138] However, the Council maintains its discretion in this regard in three main ways. First, as the International Court confirmed in *Namibia:*

[134] United Nations Secretary-General, 'An Agenda for Peace: Preventive Diplomacy, Peace-making and Peace-keeping' (17 June 1992) UN Doc A/47/277–S/2411, at para 82.
[135] See, eg, UN Doc S/PV.6672 (Resumption 1) (30 November 2011) (statement of Malaysia) at 12.
[136] This rule is mirrored in Rule 37, Security Council Provisional Rules of Procedure.
[137] Rule 38, Security Council Provisional Rules of Procedure.
[138] Sievers and Daws (n 1) 244.

> The language of Article 32 of the Charter is mandatory, but the question whether the Security Council must extend an invitation in accordance with that provision depends on whether it has made a determination that the matter under its consideration is in the nature of a dispute. In the absence of such a determination Article 32 of the Charter does not apply.[139]

Therefore, the Council can avoid involving non-members at this first procedural hurdle if the request is deemed not to meet the prerequisites set out in Article 32. For example, the Council may decide that it does not consider the member state to be a 'party' to the dispute, or that the matter is not a 'dispute' according to the meaning ascribed to the term by the Charter, or that the matter under its consideration is not clearly in the nature of the dispute.[140] Second, there is some ambiguity in relation to the relationship between the Charter rules and the Rules of Procedure. For example, there is no rule which expressly gives effect to the provision in Article 32 for inviting non-Council members 'to participate'.[141] It is not clear what 'participation' actually entailed in this context. Although in some instances the non-Council member state may be invited to give a statement, it is more likely that 'participate' simply refers to being invited to sit at the Council table, or even at a side seat in the Chamber, without speaking.[142] The right to attend a Council meeting, without participating in the debate, and without voting, may be seen as something of a dead letter. Third, the final stanza of Article 31 provides that it is ultimately to the Council to decide upon the conditions as it deems just for the participation of a state which is not a Member of the United Nations.

Broader participation in deliberations has, to a limited extent, been achieved in the case of thematic debates as well as in the case of legislative resolutions (even if the decision to adopt the resolutions still rest with the Council's members and specifically the permanent membership). According to Liechtenstein, for example, 'open debates of the Security Council are an important means of enabling the Council to hear the view of other Member States and thus to truly act on their behalf, as foreseen in the Charter of the United Nations'.[143] However, all things considered, the result is that invitations issued (and not issued) by the Council cannot be 'satisfactorily arranged within a classification deriving from the relevant Charter Articles and Rules'.[144] In recent years the practice has been for the Council to turn down requests

[139] *Namibia* at 24.
[140] Sievers and Daws (n 1) 247.
[141] Ibid 244.
[142] Ibid 248.
[143] UN Doc S/PV.4950 (22 April 2004) at 11-12
[144] Sievers and Daws (n 1) 245.

informally, thus it is impossible to actually ascertain whether the decision is based upon a particular legal requirement, or another motive is at play.[145] Sievers and Daws conclude, somewhat self-evidently, that '[i]t would seem that most often the reasons for rejecting a request have been political rather than legal'.[146] Ultimately, because the Council remains the 'master of its own procedure' it is not required to explain on what basis an invitation has, or has not, been extended.

2.3. Deliberation

To Bernard Crick, politics 'arises from accepting the fact of the simultaneous existence of different groups, hence different interests and different traditions … to rule politically is to rule by listening to these other groups … so as to conciliate them as far as possible'.[147] As Klabbers observes, '*one cannot take the politics out of politics*. All the rage about constitutionalism, about limiting the work of organizations by appealing to values, to human rights standards, is bound only to engender additional political debate'.[148] Political constitutionalism is concerned with opening up the space for political debate. We might say, therefore, that rather than a democratic deficit *per se*, the Council suffers from a 'deliberative deficit'.[149] Ian Johnstone's central argument is that steps can and should be taken to bring down the 'deliberative deficit' in the Security Council. He argues that these steps would be more 'politically achievable than expansion of the membership or changes in voting rules, improving the quality of deliberations would enhance the legitimacy and, therefore, effectiveness of Council decision making'.[150] Johnstone's key contribution is that he takes the democratic deficit critique seriously, but shifts attention from membership and voting to deliberative features that exist in nascent form and could be built on without radically transforming the body or rendering it hopelessly

[145] See, eg, UN Doc S/2007/618 (18 October 2007) at 1-4 (letter from João Salgueriro, Permanent Representative of Portugal to the United Nations, stating regret that the President of the European Union had not been allowed to participate in the debate on the report of the Peacekeeping Commission).
[146] Sievers and Daws (n 1) 247.
[147] Bernard Crick, *In Defence of Politics* (first published 1962, Bloomsbury 2013)17-18.
[148] Jan Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism' in Jan Klabbers and Asa Wallendahl (eds), *Research Handbook on the Law of International Organizations'* (Edward Elgar 2011) 17.
[149] Devika Hovell, 'The Deliberative Deficit: Transparency, Access to Information and UN Sanctions' in Jeremy Farrall and Kim Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalized World* (Cambridge University Press 2009) 92, 98.
[150] Ian Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing down the Deliberative Deficit' (2008) 102(2) *American Journal of International Law* 275, 275.

inefficient.[151] Johnstone draws heavily on the theory of deliberative democracy: 'public-policy decision making succeeds best when voting and bargaining by reasoned argumentation. While deliberations in the UN Security Council are politicized, they are also surprisingly structured-infused by certain expectations and understandings about what counts as a good argument'.[152]

Deliberative democrats hold that voting alone cannot legitimate collective decisions; the decisions must be *justified* in terms that those who are subject to them can accept.[153] In this light, Johnstone refers to an emerging 'global public reason' comprised of 'norms, values and forms of argument suited to justification in global politics'.[154] To say that the ideal of public reason has some significance in global politics means those engaged in politics at that level feel compelled to justify their decisions on the basis of considerations that others can reasonably be expected to view as relevant. Specifically, Johnstone emphasises 'the discursive function of the Council, a place for contestation and deliberation when the international community is divided on how to address threats to the peace'.[155] At his most optimistic, Johnstone argues that contestation has 'reinforced the function of the Council as the centre of a discursive process that helps to manage tensions about the use of force that inevitably arise in a pluralistic world.[156] Habermas's theory of communicative action holds that there are at least three kinds of communicative behaviour: bargaining based on fixed preferences; strategic argumentation, in which arguments are used to justify positions and persuade others to change their minds; and 'true reasoning' in which actors seek a reasoned consensus on the basis of shared understandings, where each actor not only tries to persuade but is also open to persuasion.[157] The last is Habermas's ideal of communicative action. He imagines an 'ideal speech situation' within which discourse occurs unaffected by relationships of power and coercion or any other factors extraneous to 'the force of the better argument'.[158]

[151] Ibid. See further, Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14(3) *European Journal of International Law* 437, 461-464.
[152] Johsnton 'Legislation' (n 150) 276.
[153] Johnstone, *The Power of Deliberation* (n 9) 15.
[154] Joshua Cohen and Charles Sable, 'Global Democracy?' (2005) 37 *New York University Journal of International Law and Politics* 763.
[155] Ian Johnstone, 'When the Security Council is Divided: Imprecise Authorizations, Implied Mandates, and the Unreasonable Veto' 227, 229.
[156] Ibid.
[157] Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (trans Thomas McCarthy, first published 1986, Polity Press 2004); Thomas Risse, "Let's Argue': Communicative Action in World Politics' (2000) 54 *International Organization* 7.
[158] See, further on this point, Johnstone (n 151).

Whenever people use language to coordinate their actions, they enter into a commitment to justify their words and actions on the basis of good reasons.[159] Habermas stresses an inclusive and pluralistic conception of what counts as a good reason, and he insists that those reasons are uncovered discursively, through argumentation.[160] The discursive interaction is not a communicative free-for-all, in which any argument is as good as any other. As an *inter-subjective* practice, it is constrained by the felt need to make arguments that the intended audience sees as relevant, rather than arbitrary or beside the point: arguments that they can understand and accept in principle, even if they disagree with the ultimate outcome of the debate. The ideal speech situation does not describe the real world but rather is a construct against which the quality of actual deliberations can be measured.[161] The theory of deliberative democracy holds that voting alone cannot legitimate collective decisions, that the decisions must be justified in terms that those who are subject to them can accept, at least in principle. Thus, more meaningful deliberation can partially address the democratic deficit in international organizations, without resort to an unrealistic (and theoretically unsustainable) vision of global democracy.

The practical point is that a Security Council decision is more like to succeed when voting and bargaining are accompanied by reasoned argumentation. Disagreements are settled through the exchange of reasons that are shared or can be shared by all who are bound by the decisions taken. At least part of the logic seems to be that decision-makers must make their case for a decision on the basis of reasons that are shared or can be shared by all who are affected, even if they do not agree with the decision itself. Deliberation on the basis of agreed standards injects an element of impartial argumentation into the process, mitigating the effects of material power, calculations of national interests.[162] In Johnstone's succinct summation: 'you make your claims on terms that I can accept in principle. I make my claims on terms that you can accept in principle'.[163] Hovell opines that '[p]rocedural standards aim to create a form of dialogue between decision-makers and the community to whom the decisions relate as a means

[159] Johnstone, *The Power of Deliberation* (n 9) 15.
[160] Ibid 15.
[161] Ibid 15.
[162] The theoretical roots of that line of argument are in the theory of deliberative democracy, which holds that decisions must be justified in terms those who are subject to them can accept. See Ian Johnstone, "Deliberative Legitimacy in International Decision-Making" in Hilary Charlesworth and Jean-Marc Coicaud, eds., *The Faultlines of Legitimacy* [forthcoming in 2006] and Ian Johnstone, "Deliberating and Legislating in the Security Council" in Bruce Cronin and Ian Hurd, eds., *Virtual Authority in the UN Security Council* [forthcoming] ["Deliberating and Legislating"].
[163] Johnstone, *The Power of Deliberation* (n 9) 15.

of enhancing the legitimacy of the decision-making process'.[164] This dialogue should aim to establish an 'equilibrium of involvement' in the particular context, or the point at which the connection between decision-makers and the relevant community is sufficient to engender acceptance of decisions within the community to which they relate.[165] Enhanced deliberation has been identified explicitly as a question of accountability. Johnstone advocates a 'discursive accountability that involves the interaction of … the many stakeholders who are affected by the activities' of the Security Council.[166]

According to Sievers and Daws, 'no other practice of the Security Council has so troubled its relations with non-Council Member States as the marked increase in consultations of the whole since the end of the Cold War'.[167] The fact that many substantive decisions were being taken in private during consultations of the whole caused non-Council Member States to chafe at their declining ability to influence Council decisions.[168]According to one Council member, 'the real business of the Security Council is not dealt with in the open … when it comes to transparency, inclusiveness and *accountability*, the model is broken'.[169] Formal meetings of the Council are, as a rule, public.[170] However, the bulk of Council business is conducted behind closed doors.[171] The picture appears to be one of a closed circle. Most often, the original sponsor of a resolution is themselves a permanent member. Any consultation on the substance of a draft resolution which follows will typically only include select (friendly) states and usually only include other permanent members. In almost all cases, consultation is conducted informally and there is no public record.[172] Verbatim records of formal meetings are kept, and in accordance with Rule 54 of the Provisional Rules of Procedure these are published, so this record can be a valuable outlet for transparency. However, while members may provide a statement during the debate which precedes the vote and may also explain their vote either

[164] Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford University Press 2016) 5.
[165] Ibid 168.
[166] Ian Johnstone, 'Are Functionalism's Flaws Fatal?' (20 August 2015) *EJIL: Talk* https://www.ejiltalk.org/reply-to-klabberss-article/.
[167] Sievers and Daws (n 1) 72-73.
[168] Ibid 672.
[169] Letter from the Permanent Representative of Finland to the United Nations addressed to the President of the Security Council (1 August 2011) UN Doc S/2011/484, at 14 (emphasis added).
[170] Rule 48, Provisional Rules of Procedure.
[171] Moeckli and Fasel (n 115) 15.
[172] Moeckli and Fasel (n 115) 16; Wood (n 34) 80-82; Sievers and Daws (n 1) 396. See, further, UN Doc S/PV.6870 (26 November 2012) at 17, during which the representative of South Africa expressed concern 'that resolutions and decisions of the Council are often drafted in small groups and presented as *faits accomplis* to elected members'.

before or after, states are under no obligation to do so and often do not.[173] Even when member states do provide an explanation, formal meetings of the Council are essentially 'pro forma affairs: they merely serve to put on record what has already been informally agreed'.[174]

An argument that the Security Council should be required to hold all meetings in public is difficult to sustain. The Council is, of course, a 'quintessentially political organ that will often have to discuss delicate political matters', by necessity in private.[175] It is problematic, however, that 'informal consultations of the whole', or informal consultations of the permanent members only, have become the rule rather than the exception. These meetings are not provided for in the Charter or the Provisional Rules of Procedure.[176] Neither is the more recent practice of holding 'Arria-formula' meetings, which differ from consultations of the whole in the following respects. They do not officially constitute an activity of the Council. For this reason, although the first 'Arria-formula' meeting was convened by Ambassador Arria while serving as Council President, in contemporary practice meetings are convened by a Council member or members other than the President. Participation is at the discretion of individual members and is not compulsory. To further underline their informal nature, 'Arria-formula' meetings are not indicated on the monthly program of the Security Council, nor are they recorded systematically in the Council's Annual Report.[177]

2.4. Justification

The ILA Report states specifically that organs of an international organisation 'should state the reasons for their decisions or particular courses of action whenever necessary for the assessment of their proper functioning or otherwise relevant from the point of view of their accountability'.[178] The Security Council has been described as 'a body in which confidentiality and informality regarding the decision-taking process are part of the business'.[179] However, as

[173] Moeckli and Fasel ibid 17.
[174] Moeckli and Fasel ibid 20; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) 108: 'The net result is that the Security Council meets in public only to adopt resolutions already agreed upon in informal meetings, without giving any insight into the motives underpinning its decisions'.
[175] Moeckli and Fasel (n 115) 73.
[176] This does not imply, however, that these meetings are contrary to those documents, since under Article 30 of the Charter the Council is the master of its own procedure and is entitled to determine its own practices.
[177] Sievers and Daws (n 1) 76.
[178] International Law Association, 'Report on the Accountability of International Organisations' (Berlin Conference 2004) at 13.
[179] Statement by Ambassador Ronaldo Mota Sardenberg, Permanent Representative of Brazil to the UN (13 October 2003) (cited in Hovell, 'Deliberative Deficit' (n 184) 92).

Alexander Orakhelashvili has noted, an 'essential requirement for the valid exercise of discretion is that the organ in question has to specify in an open and transparent manner what specific objective its policy aims to achieve and how the conduct of the relevant legal persons adversely affects it'.[180]

The permanent member veto is consistently cited as one of the main obstacles to the Security Council's effective functioning. The very first reform efforts actually related to the abusive use of the veto. In 1949 the General Assembly adopted a resolution that asked the permanent members to 'exercise the veto only when they consider the question of vital importance'.[181] However, this sentiment was not reflected in practice. A number of important recent developments have, nevertheless provided a shift in impetus. The ICISS Report calls on permanent members to adopt a 'code of conduct' for the use of the veto with respect to actions that are needed to stop or avert a significant humanitarian crisis.[182] The High-level Panel Report urges permanent members 'to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses'.[183] The Secretary-General, in his Report 'Implementing the Responsibility to Protect', also urged permanent members 'to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect'.[184] Indeed, the High-Level Panel, in preparing its report to the Secretary-General in preparation for the 2005 World Summit, suggested an agreement that there be no use of the veto in cases involving the responsibility to protect.[185] The group of five small nations has consistently adopted this measure as part of their proposals on the working methods of the Security Council.[186] Especially in the context of situations that trigger the Security Council's 'Responsibility to Protect', a number of states

[180] Alexander Orakhelashvili, *Collective Security* (Oxford University Press 2011) 155.
[181] UNGA Res 267 (III), 'The Problem of Voting in the Security Council' (14 April 1949) UN Doc A/RES/267(III), para 3(c).
[182] Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (December 2001) <http://responsibilitytoprotect.org/ICISS%20Report.pdf> ('ICISS Report') at 51.
[183] Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2 December 2004) UN Doc A/59/565, at para 256; see further, ICISS Report ibid, para 257, proposing the introduction of 'indicative voting', pursuant to which members of the Security Council should, prior to voting, give an unbinding indication of their position on a proposed decision.
[184] UNSC Provisional Verbatim Record (12 January 2009) UN Doc A/63/677, at para 26.
[185] High Level Panel Report, at para 256; Report of the Secretary-General, 'Implementing the Responsibility to Protect' (12 January 2009) UN Doc A/63/677, at para 61.
[186] See, especially, the resolution drafted by Costa Rica, Jordan, Singapore and Switzerland (3 May 2012) UN Doc A/66/L.42/Rev.1, paras 19 and 20, which called upon the permanent members of the Council to consider explaining reasons for resorting to the veto, and refraining from using veto to block Council action aimed at preventing genocide, war crimes and crimes against humanity. The resolution did not ultimately come to vote due to Switzerland's withdrawal to avoid political controversy in the General Assembly. See Vashakmadze, 'Responsibility to Protect' in *Commentary,* 1233.

have supported the view that the veto should not remain unlimited.[187] The rationale seems to be that governments who are required to announce their positions publicly prior to an actual vote will be less likely to cast a veto if the reasons for it 'are unlikely to pass muster in the court of international public opinion'.[188]

Non-member states have, unsurprisingly, been the strongest proponents of the 'Responsibility Not to Veto'.[189] However, as a permanent member, the position of France has been particularly noteworthy. On a number of occasions, France has supported proposals to limit the use of the veto in situations which pertain to the Responsibility to Protect.[190] None of the proposals have been implemented in the practice of the Council. There is certainly no legal basis to support an obligation not to veto, or even to give reasons, as a matter of positive international law. However, it can be argued that recent debates have 'raised the possibility of undesirable political consequences for those Council members that block [Security Council] action in the face of large-scale atrocities through the use of their veto powers'.[191]

3. Standards: The Legitimisation of Security Council Decision-Making

A normative defence of accountable authority implies a notion of legitimacy. As Danielle Hannah Rached suggests, accountability 'has become a cornerstone of current discussion on the prospects of legitimate and effective global governance'.[192] As Julia Black observes,

[187] UNGAOR (23 July 2009) UN Doc A/63/PV/97 Representative of Korea, at 20: supporting the proposal that 'the five permanent numbers to refrain from employing the veto, or the threat of veto, in situations of manifest failure to meet R2P obligations'; see, further, ibid, representatives of Lichtenstein at 22; Costa at 24; New Zealand at 25; and Italy at 28.

[188] Ian Johnstone, 'Legal Deliberation and Argumentation in International Decision-Making' in Hilary Charlesworth, Jean-Marc Coicaud (eds), *Fault Lines of International Legitimacy* (Cambridge University Press 2010) 175, 202.

[189] UN General Assembly Draft Resolution (15 May 2012) UN Doc A/66/l.42/Rev.2, para 20, recommended that permanent members consider '[r]efraining from using a veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity' (proposed by Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland (the so-called 'Small Five')).

[190] See, eg, UNSC Verbatim Record (26 November 2012) UN Doc S/PV.6870, at 15: 'France supports the permanent members of the Council voluntarily and jointly foregoing the use of the veto in situations under the Council's consideration in which mass atrocities are being committed…', and UNSC Verbatim Record (29 October 2013) UN Doc S/PV.7052, at 13, suggesting an alert mechanism to trigger the voluntary suspension of the veto right. The specific proposal was that '50 Member States could challenge the Security Council when they believe that a crime on a massive scale has occurred'.

[191] Mindia Vashakmadze, 'Responsibility to Protect' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus, *The Charter of the United Nations: A Commentary* (3rd edn, vol 1, Oxford University Press 2012) 1201, 1233.

[192] Danielle Hannah Rached, 'The Concept(s) of Accountability: Form in Search of Substance' (2016) 29 *Leiden Journal of International Law* 317, 317.

'accountability is the means by which legitimacy communities seek to ensure that their legitimacy claims are met'.[193] By ensuring accountability, member states seek to validate the congruence between Security Council decisions and their own legitimacy claims and, where necessary, to bring the Council closer to meeting those claims. Those who dispute the Council's legitimacy will, in turn, contest the associated accountability relationships. Those seeking to build accountability relationships that will validate a particular form of normative claim (for example liberal-legalism) will contest accountability relationships which seek to validate a conflicting normative claim (for example functionalism).[194] The accountability relationship is thus a central element in the construction and contestation of the Security Council's legitimacy.

Addressing the international legal system generally,[195] and the Security Council specifically, through the prism of legitimacy is certainly not new.[196] In the context of the 'turn to international institutions' in recent times, the question of the legitimacy of international institutions has also received sustained scholarly attention in the field of international relations.[197] But the concept of legitimacy has not explicitly taken centre stage in the international legal literature relating to the accountability and constitutionalisation of the Security Council. Instead, as clarified in chapter four, the principle legality has been presented as the appropriate standard of accountability. It is submitted that through a political constitutionalist lens the yardstick for accountability shifts from compliance with international law towards the broader notion of the *legitimate* use of the Council's power. Legitimacy is, in

[193] Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation and Governance* 137, 149.
[194] Julia Black, Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes (2008) 2 *Regulation and Governance* 137, 149.
[195] Indicative contributions to the field of international law include, *inter alia*, Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008); José E Alvarez, *International Organizations As Law-Makers* (Oxford University Press 2006); Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford University Press 2003); Thomas M Franck, *The Power of Legitimacy among Nations* (Oxford University Press 1990).
[196] See, specifically, Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton University Press 2007); see, further, Justin Morris and Nicholas J Wheeler, 'The Security Council's Crisis of Legitimacy and the Use of Force' (2007 44 *International Politics* 214; Christine Gray, 'A Crisis of Legitimacy for the UN Collective Security System?' (2007) 56(1) *International and Comparative Law Quarterly* 157; Jochen A Frowein, 'Issues of Legitimacy around the United Nations Security Council' in Jochen A Frowein, Klaus Scharioth, Ingo Winkelmann, and Rüdiger Wolfrum (eds), *Negotiating for Peace: Liber Amicorum Tono Eitel* (Springer 2003) 121.
[197] See, earlier, Inis Claude Jr, *Swords Into Plowshares: The Problems And Progress Of International Organization* (4th edn, 1984); and more recently, Dominic Zaum, *Legitimating International Organizations* (Oxford University Press 2013); Ian Clark, *Legitimacy In International Society* (Oxford University Press 2005); Jean-Marc Coicaud and Veijo Heiskanen (eds) *The Legitimacy Of International Organizations* (United Nations University Press 2001).

the words of Bernard Crick, 'the master question of political science'.[198] It is also an extremely ambiguous and contested notion, rife with 'fuzziness and indeterminacy'.[199] To navigate some of this ambiguity, in this section, I will draw upon two distinctions – *de facto* and *de jure* authority, and input and output legitimacy – to a) clarify the essential elements of legitimacy as applicable to the Security Council's decision-making under Chapter VII and b) show how a shift to legitimacy discourse, vis-à-vis political constitutionalism, might open up the space to consider the full breadth of the Council's accountability deficits.

3.1. *De Facto* and *De Jure* Authority

The relationship between legitimacy and legality is not clear-cut. It is interesting to note two seemingly contradictory arguments relating to the etymology of legitimacy. Christopher Thomas has argued that the term is derived from the Latin *legitimus* (lawful), as derived from *lex* (law), which implies a legalistic heritage.[200] In this sense, accountability, in its traditional sense of limiting power through law, can be legitimising. Klabbers has suggested that constitutional limitations can be of benefit to an international organisation, in the sense that it generates legitimacy. He states that, 'a constitutional organization is a legitimate one, precisely because it can claim to be controlled'.[201] To Christian Reus-Smit, conversely, it 'is in the political realm, though, that the original meaning of the term lies, deriving as it does from the quintessential politico-legal term 'legislate'.[202] The relationship between legitimacy and legality is, therefore, *the* pressing question. One option, as described by Anthony D'Amato, would be to suggest that there is, in fact, no line of demarcation.[203] Reflecting its foundations based in legal positivism (and legal constitutionalism), in many ways, conventional discourse on Security Council accountability adopts this position, in the sense that holding the Council to its legal obligations, hence ensuring the principle of legality, is deemed sufficient to ensure

[198] Bernard Crick, *The American Science of Politics: Its Origins and Conditions* (University of California Press 1959) 150.
[199] James Crawford, 'The Problems of Legitimacy-Speak' (2004) 98 *Proceedings of the American Society of International Law* 271, 271.
[200] Christopher A Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34(4) *Oxford Journal of Legal Studies* 729, 734.
[201] Klabbers, 'Contending Approaches' (n 148) 13.
[202] Christian Reus-Smit, 'International Crises of Legitimacy' (2007) 44 *International Politics* 157, 158.
[203] Anthony D'Amato, 'On the Legitimacy of International Institutions' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 83, 85; see, further, on the notion of 'legal legitimacy', Rüdiger Wolfrum, 'Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 1, 23-24.

legitimacy.[204] But, ultimately, D'Amato is not convinced by this. He points to 'a definite space in international legal discourse for the term "legitimate" as distinct from the term "lawful"'.[205] The exact location of this space may be uncovered through recourse to a broader conception of constitutionalism. As the editors of the *Global Constitutionalism* journal suggest, correctly, shifting to the constitutional register 'means contesting or justifying issues in terms of legitimate authority, not merely good or bad policy, justice or injustice, legality or illegality'.[206]

To support a claim that legitimacy relates to *more than legality*, it is illustrative to differentiate between two categories of the concept of legitimacy. The categories are often allocated different labels (for example empirical and normative legitimacy, or descriptive and moral legitimacy),[207] but the distinction between *de facto* and *de jure* authority, provided by Joseph Raz, is perhaps most reflective of broader trends.[208] *De facto* authority is concerned with the empirical question of whether an actor, as a matter of fact, has the competence and capacity to act in a certain manner. This aspect of legitimacy thus refers to the entitlement to issue authoritative decisions that require compliance from those subject to them. Here legitimacy is generally taken to mean the 'right to rule', or the right to govern.[209] *De facto* authority resonates with Joseph Weiler's distinction between formal and social legitimacy, where formal legitimacy is 'akin to the juridical concept of formal validity'.[210] As demonstrated in chapter five, subject to very limited exceptions, the Security Council is subject to almost no *formal* juridical limits on its decision-making capacity under Chapter VII. Bianchi notes that it is hard to deny that the 'textual constraints' – on the Council 'are tenuous, if not altogether non-existent'. [211] Its *de facto* authority is hardly in question.

The concern that legitimacy discourse might be used to supplant legal discourse, or worse, to use it as a means to dodge or get around the law, is a valid one.[212] Georges Abi-Saab, for

[204] This perspective has been described as the 'legitimacy of legality': David Dyzenhaus, 'The Legitimacy of Legality' (1996) 46 *University of Toronto Law Journal* 129.
[205] D'Amato (n 203) 85-86.
[206] Mattias Kumm, Anthony F Lang Jr, James Tully and Antje Wiener, 'How Large is the World of Global Constitutionalism?' (2014) 3(1) *Global Constitutionalism* 1, 1.
[207] Thomas (n 200) 734: 'the functional distinction is similar in each case'.
[208] Joseph Raz, *The Authority of Law* (Oxford University Press 1979) 4-5.
[209] See, eg, Christian Reus-Smit, 'International Crises of Legitimacy' (2007) 44 *International Politics* 157, 158-59.
[210] JHH Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge University Press 1999) 80.
[211] Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens'* (2008) 19(3) *European Journal of International Law* 491 at 887.
[212] Thomas (n 200) 732.

example, suggests that we should 'discard from the discourse of legitimacy any attempt to use it as a means to dodge or get around the law; as a passé–droit, a licence trumping legality or a "justification" of its violation'.[213]

This is also true considering the Goldstone Report's memorable verdict that the NATO military intervention, in the absence of Security Council authorisation in Kosovo was 'illegal but legitimate'.[214] The purpose of concentrating on social legitimacy is not to deny the importance of legal legitimacy qua legal constitutionalism. In fact, the two were never to be viewed as distinct entities. Weber acknowledged that 'the most common form of legitimacy is the belief in legality, the compliance with enactments which are formally correct and which have been made in the accustomed manner.' [215]

However, *de facto* authority (that is, constitutional legality) can never exist in a vacuum.[216] The second category attempts to elucidate the nature of authority by describing the necessary or sufficient conditions for the holding of legitimate (*de jure*) authority. Under this rubric, 'the concept of authority is to be explained by explaining how claims to authority can be justified'.[217] In order to show that the line between legitimacy and legality is more than purely semantic, it is essential that we adopt a sociological understanding of legitimacy. The sociological perspective is widely attributed to Max Weber.[218] By incorporating an element of justification in his definition of *de jure* authority, Raz thus acknowledges the social dimension of legitimacy.[219] Like the concept of accountability itself, legitimate authority can never be exercised in isolation, '[t]here must be some social group that judges the legitimacy of an actor

[213] Georges Abi-Saab, Security Council as Legislator and as Executive in its Fight against Terrorism and against Proliferation of Weapons of Mass Destruction' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 109, 116.
[214] International Independent Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press 2000) 4.
[215] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth and Claus Wittich eds, University of California Press 1978) 37.
[216] See, eg, Reus-Smith (n 209) 160, who captures this in the notion of 'naked power', and the idea that legitimacy veils such power, making it socially acceptable. See further, Inis Claude Jr, 'Collective Legitimation as a Political Function of the United Nations' (1966) 20(3) *International Organization* 367, 368: 'among statesmen, the lovers of naked power are far less typical than those who aspire to clothe themselves in the mantle of legitimate authority; emperors may be nude, but they do not like to be so, to think themselves so, or to be so regarded'.
[217] Raz (n 208) 6.
[218] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth and Claus Wittich eds, University of California Press 1978).
[219] See, Jean-Marc Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility* (David Ames Curtis trans, Cambridge University Press 2002) 11: the 'very idea of a right [to rule] presupposes the existence of a community. In a world in which but a single person lived, right would have no room to exist.'

or action based on the common standards acknowledged by this group.'[220] Thus, legitimacy entails an *entitlement* to authority, not merely its exercise; it is an entitlement that is socially recognised.[221] It is inextricably dependent upon social perception and recognition. The idea of legitimacy as a contestable validity claim is also reflected in the work of Habermas, who claims that legitimacy 'means that there are good arguments for a political order's claim to be recognized as right and just; a legitimate order deserves recognition. Legitimacy means a political order's worthiness to be recognized'.[222]

Mark Suchman defines legitimacy as 'a generalized perception or assumption that the actions of an entity are desirable, proper, appropriate within some socially constructed system of norms, values, beliefs, and definitions'.[223] It becomes immediately clear that these 'values and beliefs' take us beyond the contours of international law. Frowein considers that legitimacy 'refers not to the lawfulness in the strict sense, but to a higher justification of what is being done by lawful means'.[224] On this reading, it is therefore 'easier to make certain things legal than to make them legitimate.'[225] In the words of Georhes Abi-Saab, 'legitimacy lies at one remove, upstream, from legality, and explains its anchorage or rooting in society'.[226]

In search of socially acceptable reasons for the exercise of authority, it might be more plausible to look, first, at the original purpose for which the authority was constituted. Indeed, to Fritz Sharpf, any discussion of legitimacy 'needs to start from a *functional perspective*: socially shared legitimacy beliefs are able to create a sense of normative obligation that helps to ensure voluntary compliance with undesired rules or decisions of governing authority'.[227] As a logical consequence, the idea of constituent power is the entry point for a discussion about

[220] Christopher A Thomas, 'The Concept of Legitimacy and International Law' (2013) 12/201 *LSE Law, Society and Economy Working* Papers 1, 22.
[221] Reus-Smith (n 209) 161: 'The critical thing that differentiates legitimacy is the necessity of social recognition. No action can be coherently described as legitimate if it is not socially recognised as rightful'.
[222] Jürgen Habermas, *Communication and the Evolution of Society* (Thomas McCarthy trans, Polity Press 1979) 178.
1976: 178)
[223] Mark C Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 *Academy of Management Review* 571, 574.
[224] Jochen A Frowein, 'Issues of Legitimacy around the United Nations Security Council' in Jochen A Frowein, Klaus Scharioth, Ingo Winkelmann, and Rüdiger Wolfrum (eds), *Negotiating for Peace: Liber Amicorum Tono Eitel* (Springer 2003) 121, 122.
[225] Christopher A Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34(4) *Oxford Journal of Legal Studies* 729, 729, referring to Nicolas de Chamfort's 18th century maxim: '*Il est plus facile de légaliser certaines choses que de les légitimer'.*
[226] Abi-Saab, (n 213) 116.
[227] Fritz W Scharpf, 'Legitimacy in the Multi-Level European Polity' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (Oxford University Press 2010) 89, 89 (emphasis added).

accountability and constitutionalism squarely rooted in an understanding of the concept(s) as *legitimising devices.* The notion of constituent power ensures that authority, once constituted, always remains conditional, or provisional.[228] According to Neil Walker and Martin Loughlin:

> authority must … in some measure depend upon its continuing capacity faithfully to reflect that collective political identity. The formal constitution that establishes unconditional authority, therefore, must always remain provisional. The legal norm remains subject to the political exception, which is an expression of the constituent power of a people to make, and therefore also to break, the constituted authority …[229]

Once the continuing relationship between constituent power (member states) and constituted power (the Security Council) is clarified, legitimacy emerges as 'the space between international law and international politics'.[230] This is because the specific means by which the Security Council should use to fulfil its responsibilities under the Charter should remain always open to contestation. It will require different means for different situations and cannot be fixed by recourse to international law only.

Therefore, the sociological perspective goes beyond the question of whether a Security Council decision is lawful and invites consideration of other factors that might explain *why* states comply with decisions of the Security Council. Of course, states implement Council decisions because they are legally obliged to do so.[231] Legality can constitute one element that can lead to social recognition, but it is surely not the only element. States also comply because it is often in their national self-interest to do so. But legitimacy, in a Weberian sense, reflects a social motivation for obedience that could operate independently of either of these factors; an explanatory framework for voluntary compliance towards Security Council decisions because, in the words of Weber, the decision 'is in some appreciable way regarded by the actor as in some way obligatory or exemplary'.[232] Indeed, returning to D'Amato's categorisation is helpful here. Legitimacy explains *why* states comply with Security Council decisions which could be distinguished from obligation or coercion (international law) and self-interest

[228] Allen Buchanan and Robert O Koehane, 'The Legitimacy of Global Governance Institutions' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 25, 62.
[229] Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (Oxford University Press 2008) 2: (emphasis removed from original).'
[230] Anthony D'Amato, 'On the Legitimacy of International Institutions' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 83.
[231] UN Charter, art 25.
[232] Weber (n 218) 31.

(international politics).[233] This is reflected in Bianchi's summation that 'the ultimate test of the *legitimacy* of the [Security Council's] action remains the level of acceptance of its practice by the UN Member States'.[234] Indeed, this sentiment was endorsed strongly by member states in 2004:

> [t]he effectiveness of the global collective security system, as with any other legal order, depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy - their being made on solid evidentiary grounds, and for the right reasons, morally as well as legally.[235]

To be sure, the Charter provides absolutely no basis for selective implementation of Council decisions based on an auto-evaluation of an individual member state of the Council's legitimacy. Even if states view the Council as non-representative, biased, or dominated by the permanent members, they are no less obligated to implement the Council's decisions.

However, the effective implementation of Council decisions requires not just passive acquiescence by member states, but their active support.[236] Enhanced Security Council procedures can play a key role in building support for the Council's decisions. If member states see the Council members as making serious efforts to increase the Council's representation, participation and transparency, this can go far in fostering the readiness of the membership to engage actively to promote full compliance with Council decisions. It is in the best interests of the Security Council to enhance the Council's interactivity with member states and to engage proactively with them in discussing reform. If this is done with the broadest possible sense of a shared purpose (function), efforts to improve the Security Council's procedures can be an important pathway to partnership.[237] The dialogue over the Council's working methods can become more productive if the Security Council members and the wider membership keep in mind their shared interest in the effective implementation of effective decisions by the Council.[238] The greatest threat to the validity and authority of the United Nations as a whole is

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[233] Thomas (n 225) 741.
[234] Bianchi (n 211) 887.
[235] Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2 December 2004) UN Doc A/59/565, para. 204.
[236] Buchanan and Koehane, 'The Legitimacy of Global Governance Institutions' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 25, 29: 'It is not enough that the relevant actors agree that some institution is needed; they must agree that this is the institution that is worthy of support'.
[237] Sievers and Daws (n 1) 680-1.
[238] See, Renate Mayntze, 'Legitimacy and Compliance in Transnational Governance' (2010) *Max Planck Institute for the Study of Societies Working Paper 10/5* <https://www.mpifg.de/pu/workpap/wp10-5.pdf> at 12, who identifies empirical evidence 'that the belief in the legitimacy of a regime or institution, defined as reasoned

the risk that the decisions of the Security Council will be disregarded, misinterpreted, or deliberately distorted.[239]

Expanding on the importance of maintaining the support all states, specifically those directly affected by decisions, the concept of 'loser's consent' is particularly illuminating.[240] Shared legitimacy beliefs will reduce the need for and the cost of - controls and sanctions that would otherwise be needed to enforce compliance.[241] This becomes all the more necessary when the actual rules are so ambiguous. The effectiveness of democratic institutions depends, in large part, on the 'Losers' consent'. As Nadeau and Blais note 'Losers' reactions are absolutely critical'. Winners are likely to be happy with the system but losers' support for the system 'is less obvious' since that support 'requires the recognition of the legitimacy of a procedure that has produced an outcome deemed to be undesirable. In the end, the viability of electoral democracy depends on its ability to secure the support of a substantial proportion of individuals who are displeased with the outcome of an election'.[242] In other words, 'The continued existence of the system depends to a larger extent on the consent of the losers than the consent of the winners'.[243] Winning and losing thus matter because the stability and continued functioning of political systems depend on actors' incentives for institutional change. Today's losers thus are the "instigators of political change' and today's winners have the greatest incentive to avoid such change'.[244]

3.2. Input and Output Legitimacy

As political constitutionalism is concerned with the quality of the political process, as opposed to the legality of the substantive decision, it resonates with Fritz Scharpf's seminal distinction between 'output' and 'input' legitimacy.[245] Under this framework, output-oriented legitimacy

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acceptance … is in many cases related to a number of procedural characteristics, including participation, representatively and due process'.

[239] Sievers and Daws (n 1) 680.

[240] Christopher J Anderson, André Blais, Shaun Bowler, Todd Donovan and Ola Listhaug, *Losers's Consent: Elections and Democratic Legitimacy* (Oxford University Press 2005): 'the consent of the losers is one of the central, if not *the* central, requirements of the democratic bargain'.

[241] Scharpf, 'Multi-Level' (n 227) 89.

[242] Richard Nadeau and André Blais, 'Accepting the Election Outcome: The Effect on Participation on Losers' Consent' (1993) 23(4) *British Journal of Political Science* 23(4) 553, 553.

[243] Anderson et al (n 240) 7.

[244] Ibid 7.

[245] Fritz W Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999); Jens Steffek, 'The Output Legitimacy Of International Organizations And The Global Public Interest' (2003) 7(2) *European Journal of International Relations* 263, 266: 'Few conceptual contributions have left more of an imprint

focuses on the quality of the resulting decisions in terms of their substantial rationality. Output legitimacy centrally relates to the principles of efficiency and effectiveness. In other words, it is concerned with how successful institutions are in solving common problems, in realising the substantive purposes of the institution, be that, for example, the maintenance of international peace and security. However, output legitimacy also relates to the promotion of other values, for example human rights and the rule of law in the furtherance of these substantive purposes. Of course, '[c]onsenting to a process is not the same thing as consenting to the outcomes of the process.'[246] It relates to the capacity of the Council to solve collective problems and to meet the expectations of those subject to its decisions.[247] As Mayntze emphasises, 'the very difficulty of defining what constitutes a legitimating output thus emphasizes the importance of input legitimacy'.[248] Conversely, input legitimacy, for Scharpf, refers specifically to the concept constituent power, of 'government by the people', as it rests upon the presumption that those subject to the decision should be involved in the process through which the decision is reaches.[249] It is identity-based, and emphasises norms of participation and consensus.[250] This orientation of legitimacy has been the primary focus of those who decry the lack of democratic legitimacy in international institutions.[251] Input-oriented legitimacy elaborates on how interests, values, and ideas of citizens are channelled into the decision-making process.

More recently, Vivien Schmidt has proffered a third dimension of legitimacy, which she frames as 'throughput legitimacy'. Moving beyond the procedural rules which determine who has formal decision-making authority, but stopping short of questioning the substantive outcomes, or practical effectiveness, of institutions, throughput legitimacy concerns the quality of the process through which decisions are enacted.[252] It is prompted by the sense that the input-output distinction fails to offer a coherent theory 'about the practices that go on in the 'black

on the academic debate about legitimacy than the distinction between "input" and "output" legitimacy that was coined by Fritz Scharpf'. The distinction is applied to the Security Council in Sydney D Bailey and Sam Daws, *The Procedure of the UN Security Council* (3rd edn, Oxford University Press 1998) 393.

[246] Anderson et al (n 240) 4.

[247] See, Renate Mayntze, 'Legitimacy and Compliance in Transnational Governance' (2010) *Max Planck Institute for the Study of Societies Working Paper 10/5* <https://www.mpifg.de/pu/workpap/wp10-5.pdf> at 10; John G Oates, The Fourth Face of Legitimacy: Constituent Power and the Constitutional Legitimacy of International Institutions (2016) 43(2) *Review of International Studies* 199, 203.

[248] Scharpf, *Governing in Europe* (n 227) 16–20; Mayntze ibid at 11.

[249] Ibid 6.

[250] Thomas (n 220) 12.

[251] John G Oates, The Fourth Face of Legitimacy: Constituent Power and the Constitutional Legitimacy of International Institutions (2016) 43(2) *Review of International Studies* 199, 202-203.

[252] Vivien A Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput"' (2013) 61(1) *Political Studies* 2.

box' of governance', in the space between 'political input and policy output'. [253]Throughput legitimacy is closely associated with principles of deliberative democracy. As Schmidt articulates (in the context of her work on the European Union), throughput legitimacy relates to the 'quality of the governance processes as established by their efficacy, *accountability*, transparency, inclusiveness and openness to interest intermediation'.[254] Crucially, throughout legitimacy maintains an explicitly functional perspective. It 'encompasses the myriad ways in which the policy-making processes work both institutionally and constructively to ensure the efficacy of … governance'.[255]

Second, the question of legitimacy encapsulates a broader range of issues than merely the retrospective question of the substantive legality (or even morality) of the decision at hand. It additionally concerns prospective questions: who participated in the decision-making process? Did the Council follow a *fair* process? Thomas Franck, for example, presents a subjective concept of legitimacy that turns on the perceptions, beliefs, and expectations of those to whom the rules are addressed. According to Franck, rules that are perceived as both procedurally and substantively just exert a 'compliance pull on states'.

The concepts of input, throughput and output legitimacy 'all take as given the existence of a particular constituency and political community whose beliefs are or should be determinative of an institutions legitimacy'.[256] Scharpf's concept of input legitimacy is clearly at play in the work of Ian Johnstone, who concentrates on contestability. To Johnstone:

> [l]egitimate governance is rooted in a collective belief that those who govern have the right to do so: actors follow rules not only because they fear sanctions or calculate that compliance is in their interest, but because they sense that the rules and institutions from which they emanate are legitimate. These collective beliefs are not purely coincidental. They do not arise simply because a group of individuals happen to share them but, rather, through interaction in a contested, political process'.[257]

Reimagining accountability as a frame to ensure the *legitimisation* of the Security Council, as opposed to merely the legality of its decisions, is an important direction for the discourse to

[253] Ibid.
[254] Ibid 6.
[255] Ibid 7.
[256] Oates (n 251) 204.
[257] Johnstone (n 150) 277.

take. The root of the accountability deficit is, first and foremost, the inherent veto of permanent members and the lack of transparency as to the Council's political processes. Incorporating greater emphasis on these internal, political elements might offer a more holistic understanding of the term itself. Additionally, it might capture instances of inaction and ambiguity, both triggered by the inability to reach political consensus within the Council, in a way that the narrow, legal constitutionalist lens is unable.

4. Sanction

The political constitutionalist lens does not deny that there are limits to the exercise of governmental authority. But, as Griffith emphasises, '[t]he remedies are political. It is not by attempting to restrict the legal powers of government that we shall defeat authoritarianism … Only political control, politically exercised can supply the remedy.'[258] A political constititionalist lens would be extremely sceptical of a conception of accountability based on judicial review of Council decisions. Griffith offers two main objections against judicial review: one political and one philosophical. The political objection is that a rights-based method leaves political conflicts to be determined by the legal profession 'as they embark on the happy and fruitful exercise of interpreting woolly principles and even woollier exceptions'.[259] The philosophical objection is that law is being 'raised from its proper and useful function as a means to an end … to the level of a general concept'.[260] Griffith is especially critical of the 'value of the exercise of telling judges … that they should look towards the ideals of justice … in their search for the right solution to difficult cases or problems' and even more so of urging them 'to look to the moral standard of the community' because, he says, 'I do not believe these things exist'.[261] To Griffith, 'laws are merely statements of a power relationship',[262] therefore 'law is not and cannot be a substitute for politics' and that 'political decisions should be taken … by people who are removable'.[263] In his words, judicial review 'merely pass[es] political decisions out of the hands of politicians and into the hands of judges or other persons. To require a … court to make certain kinds of political decisions does not make those decisions any less political'.[264]

[258] John Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1, 16.
[259] Ibid 14.
[260] Ibid 15.
[261] Ibid 12.
[262] Ibid 19.
[263] Ibid 16.
[264] Ibid 16.

4.1. Non-Compliance as (Political) Civil Disobedience?

This final section examines whether there is a right to 'disobey' the Security Council for moral or political reasons. Actions in breach of Security Council decision may take one of two (extreme) forms. Disobedience may relate either to unilateral *action* in breach of a binding Security Council decision or in the absence of Security Council authorisation,[265] or it may relate to *inaction,* as in the refusal to comply with a binding Council decision. If such a right existed, it could be framed as a right to 'civil disobedience'. It is a concept that is wholly unknown in the context of the Security Council. Antonios Tzanakopoulos considers its applicability as a legal right at length. Jose Alvarez, on the other hand, refers to '*political* acts of defiance'. He concludes that this 'political check on the Security Council is arguably the only real remedy anticipated by the (weak) enforcement systems endemic to international law'.[266] Marco Goldoni notes that 'unexpectedly, political constitutionalists have not dealt with the issue of civil disobedience, a topic which certainly relates to the question of disagreement'.[267] The 'civil' qualification resonates with the values underpinning political constitutionalism in two main ways. In the first sense, to quality as 'civil' disobedience, the act must not be self-serving: states must be able to justify their reasons for failing to comply with a binding Council decision publicly, and by stating reasons that all states could, in principle, agree to. Second, in order to be understood as 'civil', the acts in question must not throw into jeopardy the very foundation of legal order, as might be the case with acts of disobedience involving violence, for example.[268]

It is first necessary to clarify the meaning of the concept itself, before moving to discussing its relevance to accountability claims, especially through the lens of political constitutionalism. Civil disobedience signifies 'a deliberate, open (public), violation of any law that protects or allows injustice'.[269] It is 'located within a spectrum of (politically motivated) resistance, as a

[265] Unilateral in the sense that the action has not been approved by the Security Council, as opposed to action conducted by only one state, as in the opposite of multilateral.
[266] José E Alvarez, 'The Security Council's War on Terrorism: Problems and Policy Options' in Erika de Wet and André Nollkaemper (eds), *Review of the Security Council by Member States* (Intersentia 2003) 119, 141.
[267] Marco Goldoni, 'Two Internal Critiques of Political Constitutionalism' (2012) 10(4) *International Journal of Constitutional Law* 926, 942.
[268] Turkuler Isiksel, 'Fundamental Rights in the EU after Kadi and Al Barakaat' (2010) 16 *European Law Journal* 551, 563.
[269] Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures Against Wrongful Sanctions* (Oxford University Press 2011) 158.

reaction against illegitimate concentration of power and/or against arbitrariness'.[270] If civil disobedience is necessarily unlawful, the issue of its justification belongs to the realm of the extra-legal (or *para*-legal according to some).[271] Only moral justifications are available for civil disobedience, with the subjectivity that such an enquiry necessarily brings.[272]

To be sure, many cases of law-breaking are not backed by a claim that they are justified. States may act in violation of an international obligation deliberately, because it serves their self-interest, for example, or in ignorance. These cases would not class as civil disobedience. A defining element of civil disobedience is thus that it is concerned only with cases of non-compliance in respect to which states believe they have political justification.[273] Civil disobedience is distinguished from other political acts by using violations of law as a means to achieve desired ends. Civil disobedience is a politically motivated breach of law 'to express one's protest against, and disassociation from, a law or a public policy'.[274] It can be aimed to be effective or expressive (or both).[275] It is designed to be effective if it is justified as part of a plan of action which is likely to lead directly to a change in the Security Council's decision. But civil disobedience includes examples of non-compliance which, although almost certain to be ineffective. In this sense to qualify as civil disobedience, the disobedient conduct should be open and public, as this highlights its communicative character as a form of protest.[276] Such acts are normally designed to 'catch the public eye and inevitably set people thinking of resorting to disobedience to achieve whatever changes in law or policy they find justified'.[277]

It is one thing to argue that civil disobedience is sometimes (politically, or morally) justified or even obligatory. In fact, this is an intuitive proposition. However, it is quite another thing to suggest that there is, under certain conditions, a (legal) right to civil disobedience. To say this is, in many ways, to misunderstand the nature of rights. One needs no (legal) right to be entitled to do the right thing. That a course of conduct is deemed to be subjectively right gives one all the (political) title one needs. But one needs a right to be entitled to do that which one should not. It is an essential element of rights to action that they entitle one to do that which one would

[270] Ibid 158.
[271] Ibid 160.
[272] Ibid 160.
[273] Raz (n 208) 263.
[274] Ibid 263.
[275] Ibid 264.
[276] Tzanakopoulos (n 269) 160.
[277] Raz (n 208) 262.

otherwise not be entitled to do. Acts of civil disobedience must be necessarily illegal; otherwise, one is faced with the oxymoron of a 'legal illegality'.[278] In the words of Joseph Raz:

> Every claim that one's right to political participation entitles one to take a certain action in support of one's political aims … even though it is against the law, is *ipso facto* a criticism of the law for outlawing this action. For if one has a right to perform it its performance should not be civil disobedience but a lawful political act.[279]

As such, "positive' – or *prescriptive* – legalisation of civil disobedience might be neither possible nor advisable since it would divest it of its very essence.'[280] On political grounds, there are good reasons not to elevate civil disobedience to the status of a positive right. Civil disobedience is, by definition, a very divisive action. It is all the more so because of the absence of a right to it. In taking a civilly disobedient action, 'one steps outside the legitimate bounds of toleration and this in itself adds to its disadvantages and should make one very reluctant to engage in it'.[281] This explains why civil disobedience should be viewed as an exceptional *political* action. It is exceptional in the sense that it exceeds the general boundaries of toleration, beyond the general right to political action.

Civil disobedience is also not necessarily, as is sometimes said, justified only as an action of last resort.[282] In support of a just cause, civil disobedience may be less harmful than certain kinds of lawful action. In these circumstances, it may be wrong not to resort to civil disobedience and to turn to such lawful action first. The claim that civil disobedience is justified only as a last resort, like all other claims to justify civil disobedience and identify the conditions for its legitimate use, reflects a failure to conceive its true nature. According to Raz, this represents, 'an attempt to routinize it and make it a regular form of political action to which all have a right'.[283] The exceptional nature of civil disobedience lies in the reverse of this claim, in the fact that it is 'one type of political action to which one has no right'.[284] The point is that foundational constitutionalism, by insisting on the notion of constituent power remaining at the forefront of constitutional analysis, ensures that the Security Council's power remains

[278] Tzanakopoulos (n 269) 163.
[279] Raz (n 208) 273.
[280] María José Falcón y Tella, *Civil Disobedience* (Peter Muckley trans, Martinus Nijhoff 2004) 363.
[281] Raz (n 208) 275.
[282] Cf Falcón y Tella (n 280) 355; and in relation to the Security Council, Tzanakopoulos (n 269) 160.
[283] Raz (n 208) 275.
[284] Ibid 275.

conditional on its legitimate exercise. Therefore, member states maintain the potential for civil disobedience, in order to hold the Security Council to account for illegitimate (as opposed to strictly unlawful) conduct.

Conclusion

Johnstone suggests a set of reforms presented under three headings: 'inclusive consultations', 'public justification', and 'independent review'.[285] As clarified in chapter four, conventional discourse would place the question of accountability squarely (and solely) in the final category: 'independent review'. Going further, conventional discourse would dictate that the review be conducted by judicial institutional and against legal standards. Political constitutionalism offers a useful counter-lens. It illustrates that any role for the judiciary will be reserved for regional or domestic courts and therefore implicit, in that the review would be neither of the Security Council directly or in light of international legal standards, but of the domestic or regional actors in implementing the binding Council decision, in light of each regime's discreet legal standards. There is an important accountability element of this type of review, but the manner in which it actually has an impact on Security Council decision-making will likely be 'political' and 'prospective' and will be as a result of 'legitimacy' concerns as opposed to 'legality'. It would be political in the sense that any resulting non-compliance with the Security Council resolution would be *prima facie* unlawful. Although mandated by a regional court, as this court would be enforcing a separate legal order and by virtue of Article 103 the Security Council resolution would still be legally binding, any ultimate decision would be an example of political agency, or 'civil disobedience', as opposed to a legally justified countermeasure. In this light, the position of the European Court of Justice in *Kadi* has explicitly been characterised as an example of judicial 'civil disobedience' towards the international legal order.[286] Turkuler Isiksel suggests that 'the civil disobedience interpretation makes sense in the light of the nonexistence of other, systemic remedies to patch up the human rights loophole created by the Security Council's use of smart sanctions'.[287]

[285] Johnstone (n 150) 303-307.
[286] See, Turkuler Isiksel, 'Fundamental Rights in the EU after Kadi and Al Barakaat' (2010) 16 *European Law Journal* 551.
[287] Ibid 569.

However, our etymological enquiry suggests that prospective elements are also necessary in order to provide a comprehensive definition of accountability. It is important to note that Johnstone's primary concern, in all his work on the Security Council, has been with the 'democratic deficit' within the Security Council, and any recognition to the principle of accountability has largely been either incidental or only implicit. Johnstone claims that 'by bringing down the deliberative deficit, these reforms would serve both democratic and legal values'.[288] However, these values are not mutually exclusive. As the analytical device of legal versus political constitutionalism has shown, democratic principles are a central feature of all rule of law societies (referring here to both state and post-state constitutional structures), and the law has an important role to play in both allocating public power (as responsibility) and delineating the limits of said power within (either fully or partially) democratic institutions. It seems, therefore, that political and legal constitutionalism need not be 'harmonised', as they may not be antinomies at all. The distinction is a matter of degree rather than kind and speaks to a difference in emphasis as opposed to substance. The two extreme versions, one which emphasises judicial review to Council decisions in order to protect individual rights, the other which emphasises procedural reform in order to protect (or realise) due process values, quite neatly describes, and synthesises, the current state of the debate on accountability.

Finally, accountability can, in fact, serve as a more encompassing meta-principle, which is capable of accommodating other, micro-concerns (be that democracy, the international rule of law or the protection of individual rights). That is, concerns based on democracy or the rule of law form part of a broader discourse on accountability, as opposed to the latter forming a 'second-order principle' in order to operationalise the former.[289] This, therefore, elevates accountability above its traditional habitat. However, even civil disobedience would, by definition, be 'retrospective' in that the decision will already have been made. If we reconceptualise accountability as a prospective concept, there is no reason in principle why accountability mechanisms can only be triggered *ex post facto.* An iterative *process* of accountability might serve to democratise decision-making procedures. It would serve a 'legitimacy' agenda as opposed to legality in that member states ultimately would not feel able to support the Security Council decision – the decision would have failed to maintain, in the words of Thomas Franck, the 'pull to compliance' of states.[290] Law and a sense of legal

[288] Johnstone (n 150) 276.
[289] cf Rached (n 192) 2.
[290] Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990) 19 and 24.

obligation are not irrelevant in this process, it is simply that the legal norms are given effect in a diffuse manner that depends more on reputational factors than formal dispute settlement mechanisms.[291]

[291] Ian Johnstone, 'Are Functionalism's Flaws Fatal?' (20 August 2015) *EJIL: Talk* https://www.ejiltalk.org/reply-to-klabberss-article/.

Conclusion
Oscillating Accountability

This thesis has sought to fulfil two objectives. First, it has attempted to clarify the meaning, scope, and value of the concept of accountability, as a stand-alone phenomenon distinct from the doctrine of international legal responsibility. Second, it has sought to defend the claim that the question of Security Council accountability is most appropriately situated within broader, existential, debates relating to the apparent constitutionalisation of international institutional law.

1. Beyond Responsibility

As an identifiable discourse on the question of Security Council accountability has emerged, the concept itself has been viewed through an extremely narrow lens. Prompted by the immense power at the Council's disposal when acting under Chapter VII of the Charter, the conventional approach seems to condense the pertinent issues into four questions, which have been elevated above others. The first question relates to whether the *lex specialis* of the Charter or the *lex generalis* constitute binding legal obligations incumbent upon the Council. The second relates to whether a decision of the Council can constitute a breach of that obligation. The third relates to the question of attribution. To some commentators, wrongful conduct is attributable to the UN as a whole, as the Council's parent organisation, especially as the international legal personality of the UN is universally acknowledged. To others, conduct is attributable to the Council itself or the permanent members of the Council in particular, as the actual source of the (potentially) unlawful decision. To others still, conduct is attributable to the member state(s) implementing the Council's binding decision. The fourth relates to the consequences of a breach of an obligation. In this context, the empowerment of international courts and tribunals to judicially review Council decisions, and potentially ultimately to disapply *ultra vires* decisions, has been deemed central to the process, in order to 'operationalise' the Council's accountability. As the principles of obligation, breach, attribution and sanction traditionally constitute the essential elements of the doctrine of international legal responsibility, the narrow conceptualisation of accountability does not represent a marked departure from traditional approaches. According to this narrow (legalistic) approach, the 'turn to accountability' in international legal literature appears little more than a semantic shift.

The 'accountability as responsibility' thesis should not come as a surprise. As Nico Krisch insightfully observes:

> It is natural human behaviour to fill voids with what we know. When we are thrown into unfamiliar spaces, we try to chart them with the maps we possess, construct them with the tools we already have. Working with analogies, extending and adapting existing concepts, seems usually preferable to the creation of ideas and structures from scratch, not only because of the risks involved in the latter, but also because of our limits of imagination.[1]

The doctrine of international responsibility is, in many ways, *the* organising principle of international law. In seeking to capture the nature and scope of the Security Council's power when acting under Chapter VII, it makes some sense to begin the enquiry with a 'map we already possess', a 'tool we already have'.[2] In fact, in many ways, we are socialised to do so. As James Crawford suggests, 'we are all lawyers first, before we specialise in international law or whatever else; and we naturally use analogies and examples drawn from our legal education and experience. In practice we cannot exclude analogies; the question is rather one of identifying the better or more appropriate analogy'.[3] In this light, the point of critical departure from the mainstream literature should not necessarily be the (semi-automatic) rush to responsibility, but the implication that responsibility offers the most 'apt analogy' in the context of Security Council decision-making under Chapter VII.

It is possible to divide the critique of the 'accountability as responsibility' approach into three broad categories: the first is doctrinal, the second methodological, and the third conceptual. The doctrinal criticism holds that for every argument that the Principles and Purposes of the Charter provide substantive legal parameters beyond which Security Council conduct cannot stretch; or that a restrictive interpretation of Article 25 of the Charter holds that only *intra vires* decisions of the Council are binding, a counter-argument is possible. Likewise, the notion that the Council is bound to comply with the customary international law relating to human rights (as the United Nations itself is not a party to any human rights treaties) might be logical as a matter of principle, but it is far from universally accepted as a matter of legal doctrine. Finally,

[1] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010) 27.
[2] Ibid.
[3] James Crawford, 'International Law & the Rule of Law' (2003) 24 *Adelaide Law Review* 3, 6.

there remains no court with compulsory jurisdiction to review Security Council decisions. In reality, the Charter was drafted by the permanent members of the Security Council and, as a corollary, the division of competencies within the Organisation, and the scope of the Council's power reflects their own interests. The idea that the Council would be subject to legal limitations in fulfilling its 'primary responsibility for the maintenance of international peace and security' was not comprehensively considered by the drafters in 1945. The proposition that positive international law has evolved to such a point today may, to a certain degree, have merit, but the point is that each element of this proposition should be subjected to a much higher degree of scrutiny and not taken as a given.

This leads to the methodological criticism. As Alan Boyle and Christine Chinkin have noted, 'legal positivism remains the *lingua franca* of international lawyers'.[4] The two essential traits of international legal positivism are relatively easy to decipher. According to the first trait, the existence of a legal obligation is considered a social fact, separate to and immune from questions of morality and justice. This leads to the important separation in international law of the *lex leta* and the *de lege ferenda* as entirely distinct concepts. The second trait relates to the 'sources question'. International legal positivism holds that the fundamental formal criterion to measure the validity of international law is the consent of those legal subjects who are bound to comply with the law, particularly through the prescriptive processes of treaty and custom formulation (through practice).[5] Enthusiasm for global liberal-legal constitutionalism in international law, borrowing the words of Richard Collins in another context, 'seems merely a more purposeful scratching of a mainstream itch'.[6] Allegiance to the doctrine of international responsibility has produced what might be described as an implicit 'normative positivism', in the sense that certain approaches to hold the Security Council to account through law seem to stretch both of these essential traits of international legal positivism. On the one hand, I identified above the trend to 'read in' to the *lex lata* limits incumbent upon the Security

[4] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 12; see, also, Steven Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93(2) *American Journal of International Law* 291, 293.

[5] See, generally, Steven R Ratner, 'From Enlightened Positivism to Cosmopolitan Justice: Obstacles and Opportunities' in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer and Christoph Vedder (eds) *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press) 155, 155-156. This base formulation is not dissimilar to archetypal articulations of legal positivism promulgated by, for example, HLA Hart, *The Concept of Law* (first published 1961, 3rd edn, Oxford University Press 2012); and 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593.

[6] Richard Collins, 'Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law's Past' (2009) 22 *Leiden Journal of International Law* 251, 285.

Council; these limits largely fail to stand up to subsequent examination. On the other hand, I have also criticised certain scholarly contributions that seek to elevate sporadic instances of state (and organisational) practice as evidence of customary international law binding the Council.

The strongest example of this methodology is perhaps the work of Antonios Tzanakopoulos. Tzanakopoulos argues that if the Security Council acts unlawfully, this triggers the responsibility of the United Nations. In order to hold the Council to 'account' for this breach, the argument follows that member states are justified in taking countermeasures, which may take the form of non-compliance with otherwise binding Council decisions.[7] However, his thesis rests upon just *two* examples. His first example is that of the Organization of African Unity's decision, in 1998, to cease compliance with Security Council sanctions imposed against Libya in connection with the Lockerbie attack.[8] His second example is that of the Organization of Islamic Cooperation proclaiming that the arms embargo on the former Yugoslavia imposed by the Security Council was illegal as far as it impeded Bosnia and Herzegovina's right of self-defence. The Organization called upon all member states to disobey the embargo as regards Bosnia.[9] To these examples, we might add the fact that, in respecting the judgment of the Court of Justice of the European Union in *Kadi,* member states of the European Union have essentially refused compliance with the Security Council. To be sure, these examples might be conceptualised as (political) civil disobedience. However, it is very difficult to take from two, or three, isolated responses (*in the history of the organisation*), a general legal right to refuse compliance with a Security Council resolution purported to violate international human rights norms.[10]

More broadly, the method of 'normative positivism' has deleterious implications for the theory of legal positivism as a whole. It is one thing, for example, to suggest that 'law X is flawed therefore we should reform the law in line with justice and morality', it is quite another thing to suggest that 'the law should be Y, therefore, the law is Y'. The separation of the *lex lata* and

[7] Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2011) 162-163.
[8] Ibid 162.
[9] Ibid.
[10] It is in this context that Klabbers describes the argument as a 'house of cards'. See, Jan Klabbers, 'Book Review: Antonios Tzanakopoulos, Disobeying the Security Council: Countermeasures against Wrongful Sanctions' (2011) 8 *International Organizations Law Review* 483, 486.

the *de lege ferenda* is diluted of its analytical value if the *lex lata* box is filled beyond its natural capacity.

Finally, the method also seems to misunderstand the nature of the problem at hand. The Security Council is surely a *sui generis* organisation; it is problematic to assume that the general doctrine of international responsibility can be transposed to the Council without elaboration of the political context within which the Council operates. Permanent, veto-wielding members take a broad array of factors into account in the deliberation of whether to support coercive measures under Chapter VII. These range from, *inter alia*: individual national security interests, to regional alliances, to the state of the political relationship between permanent members at the time. The point is that these are essentially political considerations and go way beyond the question of whether the proposed measures would be 'lawful'. As Rob van Gestel and Hans-Wolfgang Micklitz ask, albeit in a different context:

> Could it be that this is not first and foremost a legal problem but a matter of politics, economics and various forms of inertia fed by the protection of vested interests? Should that not lead to far greater modesty with respect to these sorts of suggestions for law reform? … What concerns us here is that legal researchers usually seem to forget that suggestions for better functioning laws and regulations normally require a different research design than evaluating if law X is in conformity with norm Y or Z.[11]

Normative positivism thus evidences the sparse lexicon of the international lawyer when faced with the complex political-institutional design of the Security Council.

This leads to the conceptual critique. Holding accountability and responsibility as synonymous misses the true value of accountability as a non-legal (or at most quasi-legal) concept. As identified in chapter one, critical discourse on the Security Council consistently highlights two polar extremes of Security Council practice: (potentially) unlawful decisions, and the failure to fulfil its primary responsibility through inaction, which is, again, primarily due to the permanent member veto power. I reframed these two planes as the dimensions of the Security Council's accountability deficit. In addition, I offered a third dimension, situated between these planes, which relates to the increasing trend toward ambiguity in Security Council resolutions. Notwithstanding the above qualifications, international responsibility may be the most

[11] Rob van Gestel and Hans-Wolfgang Micklitz, 'Methods in European Legal Scholarship' (2014) 20(3) *European Law Journal* 292, 302.

appropriate frame to question the *legality* of Council decisions. Or, put another way, it makes certain conceptual sense to categorise the debate on the substantive legal limits on the Security Council as falling within the ongoing debate on, and practice relating to, whether the doctrine of international responsibility applies to international organisations, and the important work of the International Law Commission in this area.

However, as an exclusively retrospective concept, which can by definition only be invoked *ex post facto*, legal accountability through the doctrine of international responsibility is singularly incapable of speaking to the circumstances of the Security Council failing to act, or of shedding light on ambiguous resolutions. The Council is under no legal obligation to invoke enforcement measures under Chapter VII, even when faced with an objectively identifiable threat to international peace and security, nor to ensure clarity in its decisions. Against this backdrop, chapter two sought to identify the dual function of accountability, in order to identify the conceptual line of demarcation between accountability and responsibility. According to the dual, sociological function of accountability, the concept is at once concerned with the processes of 'giving an account' *and* 'holding to account'. As an important element of any accountability regime, I argue that the Security Council should 'give an account' of its decisions (linked to the principle of transparency). Such account giving need not only be retrospective, but the Council should ensure clarity and transparency throughout each stage of the decision-making process. I have sought to elevate these prospective (political) elements in order to accommodate the three dimensions of the Security Council's accountability deficits. The central argument is that we are unable to appreciate the distinction between, and reasons underpinning, lawful and unlawful decisions; between clear and ambiguous decisions; and between action and inaction; without placing the spotlight on the political processes that they result from. The first key contribution of this thesis, therefore, is to move the terms of the debate *beyond responsibility*, in order to think politically about the concept of accountability and, by extension, about the Security Council as a political institution.

2. Oscillating Accountability: Between Legal and Political Constitutionalism

Discourse on Security Council accountability does not take place in a vacuum. In fact, it is the logical product of a broader 'turn to accountability' in international institutional law. As highlighted in chapter three, it is a truism to suggest that international institutions increasingly exercise the type of 'public authority' that has traditionally been deemed the exclusive

prerogative of states. The Security Council is no exception. The Council's 'turn to legislation' in the context of its counter-terrorism and non-proliferation regimes is a case in point. Security Council action (and inaction) can have a significant (and negative) impact on individuals. Attempts to capture this move on a theoretical level tend to conceptualise international institutional law as locked in certain dichotomies. These dichotomies range from contractualism and constitutionalism, pluralism and constitutionalism, functionalism and constitutionalism, to fragmentation and constitutionalism.[12] The common denominator is, of course, self-apparent. Around a decade ago, theories of constitutionalism dominated literature relating to international institutions. As accountability is a concept that is intrinsically associated with constitutional law, I argue that the relationship between constitutionalism to accountability in international institutional law goes beyond mere temporality. There is an intrinsic conceptual connection.

The connection between the two phenomena is clearly at play in Jan Klabbers' observation that:

> if somehow organizations can be *turned into constitutional creatures, then they can be controlled in a meaningful way*: at least to the extent that organizations exercise public authority, the authority should be subjected to control, preferably both democratic control and judicial control.[13]

The association between constitutionalism and accountability can be seen in the fact that Klabbers equates constitutionalisation with the notion of control. However, using constitutionalism as a catch-all theory encompassing all types of control is somewhat misleading, as theories of constitutionalism differ on the notion of the most appropriate method of accountability. The different approaches to constitutionalism can be illustrated by returning to the perennial tension in constitutional theory: the relationship between constituent and constituted power. On the one hand, constitutionalism relates to those free-standing norms – for example, the international rule of law and human rights – that insist on the fact that no discretionary power can exist beyond the realm of law. In this sense, constitutionalism might

[12] See references cited in Introduction chapter, fns 73-79.

[13] Jan Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 1, 15 (emphasis added); Nicholas Tsagourias and Nigel D White, *Collective Security: Theory, Law & Practice* (Cambridge University Press 2013) 345: [The Security Council] 'exercises such broad and pervasive powers, it needs to confront the *political and legal* consequences of its actions' (emphasis added).

be viewed simply as a 'theory of limited government', and accountability as the tool to operationalise the theory (holding the Council to account). On the other hand, though, constitutionalism relates to the continued effective functioning of the UN as a whole, and the Security Council as its primary political organ. In this sense, a more iterative accountability is to be embraced, whereby the Council provides 'an account' of decisions taken and not taken. The justification provided can then be assessed by the international community of states. In the above statement, therefore, Klabbers (implicitly) strikes at the heart of the tension at play in the accountability debate: the tension between legal (judicial) and political (democratic) sites of accountability. Using Klabbers' observation as a springboard, and departing from prevailing approaches, I submit that the tensions apparent in accountability discourse are, therefore, best captured not by juxtaposing certain other approaches with constitutionalism, *but within constitutionalism itself.* In this light, this thesis has identified the juxtaposition between liberal-legal (judicial) and political (democratic) constitutionalism as the meta-framework within which to situate the accountability debate.

Complementing existing constitutional elements of international law with missing ones opens up the perspective of constitutional "bootstrapping".[14] In fact, as Samantha Besson notes, such 'bootstrapping' is necessary if the process of constitutionalisation is to be anything more than merely 'disparate signs of deeper legalization, integration, or institutionalization of international law'.[15] As a counter-weight to the hegemony of legal constitutionalism, and given 'the enormous scale of powers increasingly exercised on the supranational plane, an attempt to think politically about the constitution of … *both* in the sense of enabling *and* of limiting … that power appears essential'.[16]

Danielle Rached suggests that the concept of accountability remains unstable because 'traditional taxonomies fail to precisely illuminate its political and extra-political instantiations and their respective connection with law'.[17] Rached's assertion captures the perspective

[14] Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16(2) *Indiana Journal of Global Legal* 397, 403; Thomas Kleinlein, 'Alfred Verdross as a Founding Father of International Constitutionalism' (2012) 4 *Goettingen Journal of International Law* 385, 415.
[15] Samantha Besson 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy', in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 381, 382-383.
[16] Marco Goldini and Chris McCorkindale, 'A Note from the Editors: The State of the Political Constitution' (2013) 14 *German Law Journal* 2103, 2108.
[17] Danielle Hannah Rached, 'The Concept(s) of Accountability: Form in Search of Substance' (2016) 29 *Leiden Journal of International Law* 317.

adopted in this thesis very well. It does, however, also speak to the one question that, at this point, remains unaddressed: if we are to adopt an explicitly political perspective, is there a residual space for international law, and international legal argumentation, in the context of accountability qua constitutionalism? As chapter three identified the value in situating the 'turn to accountability' within broader debates on the 'inter-public' nature of international law, it is helpful to return to Martin Loughlin's conception of public law to address this question. He defines public law as the 'assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition and sustain the activity of governing'.[18] We can take from Loughlin's definition two essential points. The first is that public law is equally concerned with limiting *and* empowering (or, in his words, 'sustaining') governmental power. The second is that even the act of limitation, the 'holding to account', need not necessarily be through legal means, but through other, non-legal 'customs, usages and manners'.[19] According to Loughlin's formulation, 'public law is neither a system of general principles nor a code of rules. Rather, *it is a vernacular language'*.[20] The idea of public law as language resonates with Ian Johnstone's theory of deliberative democracy within the Security Council. To Johnstone, '[l]anguage is the glue that holds the 'overlapping lifeworlds' together. In international society, that language is the language of international law'.[21] In other words, the language of law provides the very framework for the political participation, contestation and compromise which is at the heart of political constitutionalism.

It is, in this sense, that (global) legal and political constitutionalism need not be seen as in competition with each other.[22] I have argued that the ongoing debates centred on reforming the Council along democratic lines – that is, to ensure that the emergent global economies (for example, India, Brazil and Japan) are represented on the Council, and to ensure that decision-making processes are transparent – should be reframed as elements of the accountability debate. The second key contribution of this thesis, therefore, is to highlight the importance of incorporating both democratic and judicial elements of accountability, in order to reach a holistic understanding of the concept. Unless and until this takes place, however, the discourse

[18] Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2003) 30.
[19] Ibid.
[20] Ibid (emphasis added).
[21] Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14(3) *European Journal of International Law* 437, 461.
[22] Goldoni and McCorkindale (n 16) 2104: 'the development of the political constitution does not depend upon its juxtaposition with (let alone any confrontation with) the legal constitution; that the development of the political constitution in a perpetual defense *against* the legal constitution unduly inhibits the ways that we imagine, articulate and present our case'.

will be locked in the very tension that Klabbers identified, oscillating between accountability through the lens of legal or political constitutionalism. The contemporary accountability debate should be viewed, therefore, in the 'nature of a magnetic field' within which legal and political constitutionalism 'serve as different poles exerting influence'.[23] In other words, behind every theory of Security Council accountability lies a theory of global constitutionalism.[24]

[23] Devika Hovell uses this metaphor to describe the relationship between theory and practice in international law in *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford University Press 2016) 163.

[24] cf Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) 1: 'behind every theory of administrative law is a theory of government'.

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