Denver Journal of International Law & Policy

Volume 47
Number 2 *Spring*

Article 1

1-1-2019

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## INTRODUCTION

When the delegates met in San Francisco in 1945 to form the United Nations, one of their primary objectives in creating the Security Council (SC), as an organ of the United Nations (U.N.), was to ensure that the SC was "placed in a position to act *quickly* and *effectively*."[1] However, the record of the SC has been a far cry from that aspiration. Instead, it has a long history of logjam, attributed primarily to rivalry among the permanent, veto-wielding and national-interest-oriented SC members, and the lack of judicial or General Assembly constraints. Despite these failures, SC's collective goal of maintaining international peace and security[2] remains noble and necessary.[3] Moreover, more than seventy years since its formation, entire parts of the world such as Africa and most of Asia remain excluded from SC permanent membership. This is why scholarship that continues to urge reform of the SC remains relevant. For a more effective and inclusive SC, this article proposes that the international communities should seize the opportunities presented by changed

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1. Commission III Security Council, Verbatim Minutes of the First Meeting of Commission III, Doc. 943 III/5 (June 13, 1945), *reprinted in* 11 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO 13 (1945) [hereinafter U.N. Conference Commission III] (quoting the address by Mr. Morgenstierne (Norway)). *See also* Jean Krasno, *Legitimacy, Representation, and Accountability: A Proposal for UN Security Council Reform*, 1 YALE J. INT'L AFF. 93, 94 (2006) (stating that "[t]he Security Council was designed to be small enough to meet quickly in an emergency and decide on issues in a timely manner." (emphasis added)).

2. U.N. Charter art. 24 ¶ 1 [hereinafter "Charter"].

3. There are indications that the Cold War may be making a resurgence. Several Commentators have described that there is a new cold war already going on. *See* Carolyn Y. Forrest, *Russia's Disinformation Campaign: The New Cold War*, 33 COMM. LAW. 2, 2-4 (2018); Eric Engle, *A New Cold War - Cold Peace Russia, Ukraine, and NATO*, 59 ST. LOUIS U. L.J. 97, 99 (2014) (arguing that "Russia and NATO are on the edge of a new cold war because of the illegal annexation of Crimea and more than a half dozen other issues, such as Syria, gay rights, Magnitsky list, et cetera."). If a new cold war is already going on, the cold war dynamic in the SC may very well be going on as well, with China and Russia being more willing to veto resolutions on several S.C. resolutions. This would make the case for reforming the S.C. even more compelling.

geopolitical, economic and military circumstances to reform[4] the SC through amendment of the Charter of the United Nations. This can be through an enlarged SC that includes more permanent members on the SC, as well as making changes to the veto powers and reconfiguration of the relationships between the SC, General Assembly, and International Court of Justice. At first sight, this proposition may sound preposterous or too ambitious. This is because the inevitable result is that any meaningful, substantive and bold reforms are doomed to fail[5] due to the guaranteed resistance of current permanent members of the SC, whose right to use the veto[6] remains rock-solid and entrenched.[7] However, if economic strength correlates to military strength,[8] there is strong support for changing the permanent membership of the SC to reflect the economic realities of the post-World War II order. Even with another Cold War on the horizon, geopolitical landscape has drastically changed to enable non-SC economically advanced countries to play a major role in the resolution of challenges to international peace and security from Ukraine to Syria, and from North Korea to the South China Sea. In other words, the question is should the U.N. begin to recognize this reality by expanding the veto-wielding countries to include emerging geopolitically and economically significant countries such as Germany, Japan, Brazil, South Africa, Nigeria and India?[9]

The alternative of limiting the scope of veto power of current permanent member of the SC does not seem viable.[10] Frustrated by deadlock of the SC, the tendency

4. There is a diversity of opinion on whether reform is even worth talking about. *See, e.g.*, Princeton N. Lyman, *Saving the UN Security Council - A Challenge for the United States*, 4 MAX PLANK Y.B. U.N. L. 127, 146 (2000) (arguing that "[t]he [reform] framework should be realistic. There will be no change in the formal authority of the veto; no P-5 member will ratify such an amendment. New permanent members will not get the veto.").

5. Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 506 (1995) (observing that "Article 109 was amended in 1968 to increase from seven to nine the number of votes in the Security Council needed to complement a two-thirds vote in the General Assembly for the convening of a Charter review conference.").

6. Article 27 of the U.N. Charter provides that "[d]ecisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members. 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." Charter, *supra* note 2, at art. 27 ¶¶ 2-3.

7. *See, e.g.*, Michael J. Kelly, *U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council*, 31 SETON HALL L. REV. 319, 341 (2000) (suggesting that all "recommendations are out of the question because the current five permanent members insist on preserving their unhindered right of veto.").

8. While it is true that economic resource is not the necessary and sufficient factor to consider, studies indicate that "conventional military dominance of Western democracies stems from superior economic development." *See* Michael Beckley, *Economic Development and Military Effectiveness*, 33 J. OF STRATEGIC STUD., 43, 74 (2010).

9. *See* Alanna Petroff, *Britain Crashes out of World's Top 5 Economies*, CNN (Nov. 22, 2017) http://money.cnn.com/2017/11/22/news/economy/uk-france-biggest-economies-in-the-world/index.html. (listing the world's top seven economies in 2017 as being: The U.S., China, Japan, Germany, France, United Kingdom and India).

10. Tom Miles & Stephanie Nebehay, *U.N.'s Rights Boss Warns Russia Over Syria Air Strikes*, REUTERS (Oct. 5, 2018), http://www.reuters.com/article/us-mideast-crisis-syria-zeid-idUSKCN1240RU. (reporting that "High Commissioner Zeid Ra'ad al Hussein said initiatives to resolve the situation in

of some permanent members has been to resort to either unilateral use of force or coalitions of allied countries to resolve challenges to international peace and security. However, unilateral actions by permanent SC members, even by the most militarily powerful states such as the United States, can have only limited success, at least in the long term.[11] This happened with regard to Iraq and Afghanistan.[12] Meanwhile, permanent members of the SC have been willing to make decisions that appear to recognize the geopolitical role of non-SC economically advanced countries. This cannot be explained except for the fact that the latter have the ability to impose costs on SC permanent members through economic sanctions.[13] Multilateralism remains the most effective approach to the resolution of international security issues, and the expansion of SC to include countries that have already demonstrated that they must be reckoned with in the resolution of international security issues seems to be consistent with the multilateralism paradigm. Reform efforts have been attempted several times[14] over the course of the U.N.'s existence, but with no

besieged, rebel-held eastern Aleppo should include proposals to limit the use of the veto by the permanent members of the U.N. Security Council.").

11. *See* Lyman, *supra* note 4, at 130 (arguing that "[o]ver the longer term of any military engagement, the legitimacy of UN authorization often becomes even more important to Americans.").

12. *See* Mary Ellen O'Connell, *The Counter-Reformation of the Security Council*, 2 J. INT'L L & INT'L REL. 107, 109 (2005) (observing that the "The Secretary-General revived the idea of Security Council reform in 2003. He did so apparently out of fear of losing any more U.S. commitment to the UN following two failures by the Security Council to authorize U.S. uses of force."). Professor O'Connell argues that the Secretary General acted as if it was the SC which had acted illegally, when in fact it was the U.S. that had acted illegally in using force against Iraq without prior SC authorization which use of force the SC considered unnecessary since no weapons of mass destruction had been found. *See id.* at 110. This is true. Even then, at least with regard to Bosnia, the SC had been gridlocked in a situation that needed intervention to stop the bloodshed. Subsequent retroactive S.C. validation of the use of force in Bosnia would not negate the fact that the S.C. had been ineffective on the grounds of self-interest.

13. *See, e.g.*, Elizabeth Pond & Hans Kundnani, *Germany's Real Role in the Ukraine Crisis*, 94 FOREIGN AFF. 173, 173 (2015) (noting that Germany could have resisted the imposition of "blunt sanctions and has taken every opportunity to negotiate with Moscow … to de-escalate the fighting in Ukraine" and that Germany had begun to "assume geopolitical leadership of Europe for the first time since 1945," because Germany's Chancellor Merkel "remained in constant phone contact with [Russian President] Putin, counseling him to pull back from Ukraine while the West … warning … [that] … Russia would come under severe financial sanctions if Putin refused to comply"). A similar approach to the conflict in Syria has been attempted by the European Union, which includes Germany. *See also* Robin Emmott & Gabriela Baczynska, *EU Threatens New Sanctions Against Syria but not Russia*, REUTERS (Apr 16, 2018), https://www.reuters.com/article/us-mideast-crisis-syria-eu/eu-threatens-new-sanctions-against-syria-but-not-russia-idUSKBN1HN16P.

14. The United Nations itself has been involved in efforts aimed at reform. Prominent among these efforts is Third Report of the 1996 General Assembly Working Group which coincided with the fiftieth anniversary of the United Nations. This report proposed several proposals pertaining to reforms, especially with regard to transparency and working methods of the Security Council, its size and composition and decision-making, including the veto. Rep. of the Open-ended Working Group on the Question of Equitable Representation on and the Increasing in Membership of the Security Council, U.N. Doc. A/50/47/Rev. 1 (1998). Prior to that, in 1963, on the "initiative of a group of forty-four African and Asian States', the number of non-permanent members of the Security Council was increased from six to ten by way of an amendment based on Article 108." *See* Ingo Winkelmann, *Bringing the Security Council into a New Era - Recent Developments in the Discussion on the Reform of the Security Council,* 1 MAX

breakthrough because the national interests[15]of SC permanent members prevailed every time.[16] To some extent, it is inevitable that national interest prevails over U.N. interests because the "primary responsibility of any government is to protect the interests of its own citizenry."[17] If past efforts have fallen short, new attempts at reform must be justified by the existence of new circumstances and opportunities that increase prospects for success.[18] Thus, when the "Secretary-General Kofi Annan

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PLANCK Y.B. U.N. L. 35, 39 (1997). There have been only two "*defacto* replacements of two permanent members," that did not involve a formal amendment of the Charter, one with regard to the replacement of the Republic of China with the People's Republic of China and of the USSR with the Russian Federation. *See id.* at 42.

15. But "national interest" is the very reason that the veto exists. Wouters and Tom Ruys observe that

> The motivation, put forward by the four sponsoring States in 1945, is based on the need to guarantee peaceful relations among the world's main powers and to assure the new body of their support in order to make it sufficiently credible and vigorous. This goal, the Allied Powers argued, could only be achieved by introducing a mechanism to safeguard the vital national interests of the most important UN Member States. The reverse side was the responsibility of these privileged members to take up the responsibility to maintain international peace and security through the United Nations. The concerns underpinning the insertion of Article 27 were well-founded in light of the demise of the League of Nations. The latter organisation never managed to live up to its aspirations due to the requirement of unanimity among all members of its Council on the one hand, and the lack of support of various powerful States on the other hand (the United States never participated in the organisation, whereas Japan, Germany and Italy withdrew from it in the l930s). Eventually, the League was unable to avert the Second World War. Thus, the founding fathers of the UN somehow struck a compromise deal: the requirement of unanimity of all Security Council members was rejected as this would paralyze the exercise of its functions; the position that none should be awarded a veto was equally rejected on the ground that this would deprive the organ of the indispensable support of its core members.

Jan Wouters & Tom Ruys, *Security Council Reform: A New Veto for a New Century?*, 44 MIL. L. & L. WAR REV. 139, 157 (2005). The authors also observe that,

> Soviet Union used its veto no less than 51 times to block the applications of Kuwait, Mauritania, Vietnam, North Korea, South Korea, Japan, Spain, Laos, Cambodia, Libya, Nepal, Ceylon, Finland, Austria, Italy, Portugal, Ireland and Jordan. The United States moreover blocked the application of Vietnam six consecutive times. China used its veto twice: to reject the membership of Mongolia in 1955 and to reject the Bangladeshi application in 1972.

*Id.* at 146.

16. Consider for example, the prospect of Japan and Germany becoming permanent members of the S.C. which has not been realized. *See* Winkelmann, *supra* note 14, at 43. Some observers, however, remain opposed to increasing the number of permanent members. This view is espoused by Amber Fitzgerald, for example, who also argues that

> [i]f Germany were selected this would lead to three seats being maintained by Western European countries. If Japan were chosen this would cause more domination by the industrialized nations. France, Great Britain, and the United States want Japan to become a permanent member because they all have strong political ties with Japan, and Japan would most likely vote similarly to them. This is not a solution to provide more equality and representation.

Amber Fitzgerald, *Security Council Reform: Creating A More Representative Body of the Entire U.N. Membership*, 12 PACE INT'L L. REV. 319, 345 (2000).

17. Kelly, *supra* note 7, at 331.

18. Indeed, many nations have made a similar observation. *See* U.N. Security Council, *Rep. of the*

called for a renewed effort to reform the Security Council to infuse it with the legitimacy, representation, and accountability it needs to lead the U.N.," he also expressed "the view, long held by the majority, that a change in the Council's composition is needed to make it more broadly representative of the international community as a whole, as well as of the geopolitical realities of today, and thereby more legitimate in the eyes of the world."[19] Indeed, the "composition and working methods are considered to be outdated and no longer reflecting today's realities."[20] Another argument in support of continued reform effort is the democratic ideal and legitimacy.[21] As U.N. Secretary General Kofi Annan said, "[t]he Council must be not only more representative but also more able and willing to take action when action is needed. Reconciling these two imperatives is the hard test that any reform proposal must pass."[22]

The argument against increasing the membership of the SC is that such a change would make the decision-making process less efficient by having too many members. The counterarguments are that "increased membership otherwise might not increase perceptions of legitimacy"[23] and increased membership may make decision-making more difficult.[24]

Reduced competition between the leading military powers is another reason for optimism that reform efforts may be more successful than in the past. Even with renewed competition between the Russian Federation and the U.S., it is unlikely that there will be a full scale return to the Cold War dynamic.[25] As Professor O'Connell

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*Open-ended Working Group on the Question of Equitable Representation on and Increasing in the Membership of the Security Council*, U.N. Doc. A/58/47 (2004) [hereinafter U.N. Working Group Report] (observing that "[m]any delegations expressed support for an increase in both permanent and non-permanent membership categories, stressing the increase in the general membership of the United Nations and taking into account new economic and political circumstances.").

19. U.N. Secretary-General, *In larger freedom: towards development, security, and human rights for all*, ¶ 168, U.N. Doc. A/59/2005 (Mar. 21, 2005).

20. Winkelmann, *supra* note 14, at 36-37.

21. As John Caron notes, it is important to take concerns for legitimacy seriously because, among other things, illegitimacy,

> may make it difficult for states to build the domestic support necessary to act under a resolution. For example, because of such perceptions, a state may have trouble convincing its citizenry that granting landing rights to aircraft en route to a UN-authorized action is supportive of community concerns rather than the thinly veiled imperialism of the Council's permanent members … may lead states to move more slowly in supporting a resolution, in terms of the sending of troops, the provision of financial support, or the enforcement of embargoes.

John D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, AM. J. INT'L L. 552, 558 (1993).

22. U.N. Secretary-General, *supra* note 19, at 42.

23. Caron, *supra* note 21, at 573.

24. *Id.* (citing an Australian Permanent Representative to the UN, who said that "[p]erhaps the greatest drawback in making the Council more representative is the practical risk that a significantly enlarged Council would make decision-making more difficult.")

25. *See* Keith L. Sellen, *The United Nations Security Council Veto in the New World Order*, 138 MIL. L. REV. 187, 236 (1992) (arguing that "[b]ecause the conflict over communism is over, Cold War enemies have less reason to mistrust each other, paling the original justifications for the permanent member veto.").

notes, "[t]he end of the Cold War gave rise to a lively and hopeful period when it seemed everyone had a plan for expanding the Security Council and modifying the veto."[26] This may be the case even as some scholars believe that "reforming the veto, does not appear likely to occur any time in the near future."[27] In times of reduced competition, the permanent members have been now more willing to refrain from using their veto power even when their national interests are at stake.[28] Cases in point are the Sudan and Libya SC resolutions regarding the referral of Sudan's President Bashir to the International Criminal Court, and the imposition of a no-fly zone over Libya and referral of Libya's Gadhafi to the ICC.[29] In those cases, Russia and China simply abstained.[30] This happened even though China had strategic interests in Sudan, and Russia had strategic alliances with Libya. It is true that "[t]he relatively high degree of accord among the five permanent members has permitted the council to take decisions with an efficacy not heretofore known."[31]

Abstentions alone cannot not provide sufficient antidote to the disfunction of the SC. The old rivalries appear to be making a comeback with a Russia that in some respects longs to recapture some of its past glory and an increasingly geopolitically powerful China. This has made it increasingly difficult for the SC to pass resolutions regarding badly needed action during the so-called "Arab Spring'' as well giving impetus to Iran, Syria and North Korea to do as they please well aware that a divided and gridlocked SC would be unable act.[32] The U.S. is still considered the sole super power,[33] but there are signs of an increasingly confident China that has turned its increasing economic wealth to military buildup.[34] In sum, the SC can't "meet the unprecedented current and future challenges while structured essentially as it was fifty years ago."[35]

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26. O'Connell, *supra* note 12, at 108.

27. Caron, *supra* note 21, at 555.

28. *See generally* U.N. Security Council, Repertoire of the Practice of the United Nations Security Council: Voting (July 3, 2018) http://www.un.org/en/sc/repertoire/rules/overview.shtml#rule8.

29. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (authorizing the International Criminal Court to investigate crimes allegedly committed in Darfur, Sudan); S.C. Res.1973, U.N. Doc. S /RES/1973 (17 Mar.17, 2011) (imposing a no-fly zone over Libya to protect the civilian population); S.C. Res.1970, U.N.Doc. S/RES/1970 (2011) (referring the situation in the Libyan Arab Jamahiriya since February15, 2011 to the Prosecutor of the International Criminal Court).

30. *Id.*

31. Bruce Russett, Barry O'Neill & James Sutterlin, *Breaking the Security Council Restructuring Logjam*, 2 GLOBAL GOVERNANCE 65, 67 (1996).

32. Since the start of the Russian intervention in Crimea, Ukraine in February 2014 (in 5 years), Russia vetoed SC resolutions 13 times (or 2.6 resolutions per year). The current rate of Russian vetoes exceeds the rate during the Cold War. The USSR vetoed SC resolutions 90 times (or 2 resolutions per year while the USA vetoed SC 65 times. It is instructive that between 1991 and 2014 (in 23 years)—when supposedly the Cold War had ended—Russia used the veto only 9 times (or 0.4 resolutions per year). *See* Dag Hammarskjöld Library, Security Council – Veto List http://research.un.org/en/docs /sc/quick/ [hereinafter UN Documentation Guide].

33. Kelly, *supra* note 7, at 331 (citing GUY ARNOLD, WORLD GOVERNMENT BY STEALTH, THE FUTURE OF THE UNITED NATIONS 156 (1997)).

34. *See* Wouters & Ruys, *supra* note 15, at 158 (observing that"[a]lready some are warning of a second Cold War between the United States and China, if the latter country's economic growth were to be translated into a military build-up.").

35. Russett, O'Neill & Sutterlin, *supra* note 31, at 67.

This article reviews the work of the United Nations Security Council (SC) and asks whether it has lived up to its expectations in light of criticisms that it is radically in need of reform or whether its record only confirms the need for continued reform efforts. This article proposes the addition of the more economically advanced countries to the SC; alternatively, it proposes the amendment of the SC to provide for restrains on the veto powers, for example a U.N. General Assembly overriding two-thirds majority vote. To these ends, Part II of this article presents a background of the SC in terms of its objectives as spelt out in the Charter and as conceived by its framers. Part III presents an assessment of SC's record. Part IV discusses areas of possible reform such as the veto, composition, SC's relationship with the General Assembly and the International Court of Justice. Finally, Part V is a concise summary of recommendations.

## I. HISTORICAL BACKDROP TO PROVISIONS ON SECURITY COUNCIL

It is imperative to review the historical background in order to assess whether the rationale for SC provisions of the Charter have been borne out based on the record of the SC over the years. Against the backdrop of the Second World War, the framers of the Charter of the United Nations deliberately provided for an enormously powerful SC. The SC's core functions would be the maintenance of international peace and security,[36]as well as enforcement of the rule of law.[37]

The SC voting provisions of the Charter regarding the SC were the most consequential. Article 27 entrenches the unanimity principle, which effectively grants veto powers to the permanent SC members.[38] Under Article 27, ¶ 3 UN Charter, both elected and permanent SC members are obliged to abstain from voting in

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36. Specifically, the SC is empowered to permit the use of force. The U.N. Charter provides that

> [s]hould the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Charter, *supra* note 2, at art. 42.

37. Charter, *supra* note 2, at art 94, ¶ 1. The Charter provides that,

> [i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

The SC, although so empowered, has been largely ineffective in this regard. For example, in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua. But it is submitted that at San Francisco "[i]t seems to have been understood, though, that the Council would not do so if the losing party's failure to comply with a judgment presented no threat to the peace." Kirgis, *supra* note 5, at 509.

38. The U.N. Charter provides that "[d]ecisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members. 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." Charter, *supra* note 2, at art 27, ¶ 2-3. The U.N. Charter provides that "[t]he Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council." *Id.* at art. 23.

decisions regarding the peaceful settlement of disputes whenever they are a party to the dispute under consideration.[39] Wouters and Ruys observe that "[t]his provision was a compromise solution between the idea that the Council should never adopt coercive measures against one of its permanent members on the one hand."[40] Beyond that, however, the five permanent SC members can freely deploy their veto with little Charter restraint.

The veto provision grants the five permanent SC members incredibly enormous powers over almost all the important decisions that can be undertaken under the Charter. Veto powers were meant to avoid "the [extreme] paralysis that gripped it [the SC] during the Cold War"[41]as well as the unilateral action with its accompanying perceived lack of legitimacy that otherwise is characteristic of multilateral action. However, these provisions would have little effect on situations where one of the SC permanent member's violation of the prohibition on the use of force is involved. This can be seen in the U.S. vetoing a resolution "in response to complaints of aggression by Nicaragua in 1984-1986 and regarding the invasion of Grenada in 1983, as well as the Soviet veto with regard to its invasion of Hungary in 1956 and Afghanistan in 1980."[42] As Francis Wilcox writes:

> No important decision could be taken by the Organization without their approval. Any Great Power, if it chose, could block the admission of new members. It could prevent the expulsion of a member or the suspension of membership rights. It could hold up the appointment of the Secretary-General. It could block the admission of a state to the International Court of Justice. More important still, it could prevent the adoption of an amendment to the Charter … the Great Powers locked the amending process with the veto and put the keys in their pockets.[43]

Francis Wilcox adds, however:

> Nor can one doubt that the principle of unanimity reflects accurately the realities of power relationships in the modern world. The great states alone possess the material resources and the military might necessary to wage total war. They alone are capable of preventing war … . It was on the assumption that continued harmony among the Great Powers was the only sure guarantee for peace that the principle of unanimity was inserted in the Charter. They had pooled their resources magnificently during the war to smash the Axis. If they could meet the complex issues of the future with that same spirit of teamwork and cooperation, the problem of world peace, at long last, would be solved. The Yalta voting formula, calling for

39. Charter, *supra* note 2, at art 27, ¶ 2-3.

40. Wouters & Ruys, *supra* note 15, at 147.

41. Caron, *supra* note 21, at 570.

42. 257 vetoes have been cast in the period between 1946 and 2004. *See* Wouters & Ruys, *supra* note 15, at 145.

43. Francis 0. Wilcox, *The Rule of Unanimity in the Security Council*, 40 AM. SOC'Y INT'L L. PROC. 51, 54 (1946).

> unanimity at every step, might encourage the Great Powers to work as a team.[44]

The deliberations of the framers of the Charter explain the rationale for the veto powers as well as the composition of the SC. With respect to membership, there were two principles that delegates had to balance regarding the membership of the SC. First, they had to consider whether the SC was democratic enough and second, they considered whether it was capable of acting quickly and effectively.[45] Regarding membership of the SC, framers of the Charter expressed concern about having too many members on the SC which "might unduly increase the number of Council members and delay its decisions."[46] A French delegate also noted that "it is impossible to prevent delays resulting from … meetings … from the transport from countries … . And this, coupled with the lighting rapidity which aggression in modern war is capable of."[47]

The voting procedure of SC has been contentious from the very beginning of the United Nations. Charter negotiators "at Dumbarton Oaks could not arrive at any agreement with respect to the voting procedure in the Security Council and the whole matter was deferred until the Yalta Conference."[48] From a broad perspective, "[t]he work of the Dumbarton Oaks Conference, as elaborated on at Yalta in February 1945, was the starting point for negotiations at the United Nations Conference on International Organization held in San Francisco in May and June of 1945."[49] When the delegates met in San Francisco, one of their primary objectives was to ensure that the Security Council was "placed in a position to act *quickly* and *effectively*."[50] In this respect, one of the issues was the relation between the SC and the U.N. General Assembly.[51] The San Francisco conference was well aware of the need for the U.N. General Assembly to participate in decisions regarding enforcement measures in Chapter VII of the Charter. However, Commission III,[52] the commission that negotiated the structure, function and powers of the Security Council vis-a-vis the General Assembly, ultimately recommended that "the application of enforcement measures, in order to be effective, must … above all be swift … it is impossible … if the decision of the Council must be submitted to ratification by the Assembly, or if the measures applied by the Council are susceptible of revision by the

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44. *Id.* at 54-55.

45. U.N. Conference Commission III, *supra* note 1, at 109-10 (citing the address by Badawi Pasha (Egypt)).

46. *Id.* at 16 (quoting the address by Mr. Paul-Boncour (France)).

47. *Id.* at 59.

48. Wilcox, *supra* note 43, at 52.

49. Caron, *supra* note 21, at 568.

50. UN Conference Commission III, *supra* note 1, at 13 (quoting the address by Mr. Morgenstierne (Norway)) (emphasis added). *See also* Krasno, *supra* note 1, at 94 (stating that "[t]he Security Council was designed to be small enough to meet quickly in an emergency and decide on issues in a timely manner." ).

51. The Charter provides that "[t]he General Assembly shall consist of all the Members of the United Nations." U.N. Charter art. 9, ¶1.

52. When the nations met to discuss and negotiate the United Nations, the work of the conference was conducted in its constituent twelve committees grouped under commissions. Alfred P. Fernbach, *The United Nations Security Council*, 32 VA. L. REV. 114, 119, n.3 (1945-1946).

Assembly."[53] Denying the General Assembly a consequential role in the maintenance of international peace and security on that basis may no longer be defensible given the SC's record marked by gridlock and dysfunction. The history of SC gridlock is well-documented—from failure to intervene in the Kosovo,[54] Darfur,[55] Rwanda,[56] and now Syria[57]—with each Member of the Security Council jockeying for their strategic national interests.[58] There are very few examples of cooperation. One of them is the authorization of use of force to forcing Iraq out of Kuwait pursuant to Resolution 687 of 1991.[59]

Ultimately, the overriding consideration for the negotiators appeared to be the avoidance, at any cost, of another world war. Thus, a Norwegian delegate, referring to the work of committee 3 of Commission III stated that:

> I am sure the Committee has had in mind the bitter experience of the last thirty years. It has clearly realized that the executive body of the new world Organization must be so organized and equipped that it can

53. UN Conference Commission III, *supra* note 1, at 14 (quoting the address by Mr. Paul-Boncour (France)).

54. *See* Wouters & Ruys, *supra* note 15, at 151 (observing that "in 1998 and 1999, when large-scale fighting between Serbs and ethnic Albanese Kosovars in the Federal Republic of Yugoslavia (FRY) turned into ethnic cleansing of the latter population group, causing hundreds of thousands of people to flee their homes. Despite the situation on the ground, China and Russia made it clear that they would veto any authorisation to use armed force by the United Nations.").

55. *Id.* (observing that in "2004, Russia and China threatened to use their veto with regard to the Sudanese region of Darfur, where Arab militias committed large-scale killing and raping of civilians, aided and abetted by government officials.")

56. *See id.* (noting that, "[w]hen the Security Council considered the possibility of intervening to halt the [Rwanda] massacres, two permanent members, France and the United States (the latter partially motivated by the loss of 18 soldiers in Somalia in 1993) blocked the establishment of a robust intervention force.").

57. On 4 October, 2012, a draft resolution on the Syrian Arab Republic was put to the vote. The draft was not adopted owing to the negative vote of two permanent members. *See* Rep. of S. C., at 33, A/67/2 (2012) [hereinafter Report of the Security Council] *See also* MEGAN PRICE ET AL., UPDATED STATISTICAL ANALYSIS OF DOCUMENTATION OF KILLINGS IN THE SYRIAN ARAB REPUBLIC 2 (June 13, 2013) (stating that between March 2011 and April 2013, conflict-related violent deaths in Syria had reached at least 92,901).

58. *See, e.g.*, Richard Butler, *Bewitched, Bothered, and Bewildered: Repairing the Security Council,* 78 FOREIGN AFF. 9, 10 (1999) (arguing that permanent members of the SC have in the past "weighted their narrow national interests over collective responsibility."). *See also* Wouters & Ruys, *supra* note 15, at 141, 160 (arguing that "[t]he veto is considered fundamentally unjust by a majority of States and is thought to be one of the main reasons why the Council failed to respond adequately to humanitarian crises such as in Rwanda (1994) and Darfur (2004)). It is thus not surprising that most States wish to abolish or restrain it." This is the case, even though the San Francisco Declaration, stated that **"**It is not to be assumed, however, that the permanent members **…** would use their 'veto' power willfully to obstruct the operation of the Council." *Id.*

59. Crispin Tickell, *The Role of The Security Council in World Affairs*, 18 GA. J. INT'L & COMP. L. 307, 312 (1988). (stating that the Security Council's "more impressive achievements in the past were the withdrawal of Soviet forces from Iran in 1946; the sending of a peacekeeping force to Suez ten years later which allowed the British and French troops to withdraw; and the creation of peacekeeping forces which helped establish the ceasefire during the Yom Kippur war of October 1973. The UN-supervised ceasefire was an essential precursor to the subsequent peace negotiations which led to the Camp David Agreement.").

> prevent, as far as it is humanly possible to prevent, the outbreak of another devastating world struggle like the one which today we are only half through. Even now, when we feel a tremendous and justified relief at the war in Europe being over, we cannot forget for one moment that, on the authority and ability of the Security Council to act with all possible dispatch and forcefulness, may very well depend at some future date, the security, the peace, and the very existence of the freedom- and justice-loving nations of the world.[60]

Nevertheless, the veto power remained a particularly contentious issue and the delegates vigorously debated it, with some countries mounting some resistance to the proposal. The delegates were interested in the question of whether "the new security organization is to prove impotent and, therefore, be a failure, or whether it is to be provided with the necessary means for carrying out its important task."[61]

> The inclusion of permanent seats with the veto was initially required to keep the major powers in the organization… . The twenty-one Latin American nations, joined by Australia and the Philippines, led the resistance to the privileged status of veto-wielding members. They resented the notion of the veto, but in the end knew that there would be no U.N. Charter without the five major powers. In the final vote on the veto, thirty-three nations supported, two opposed, and fifteen countries abstained.[62]

The delegates understood that ultimately, "the United Nations cannot function properly without the support of the world's most powerful States … safeguarding the essential interests of the latter States is the necessary price to pay."[63] For example, the Australian delegate observed that "the provision requiring unanimity of the great powers in affirmative votes on matters other than procedure means that each one of the five powers can prevent a decision being reached even though ten out of the eleven members favor such a decision."[64] However, the Australian delegation's argument—which was also supported by other delegations—was that the scope of the veto power "should be as restricted as possible so that no one great power could by its individual action block Council decisions."[65] This was a sensible proposition in light of the gridlock that would later characterize the SC.[66] Whereas the negotiators "assumed that five Permanent Members of the Security Council could act as world policemen with real powers … . It soon became clear that things would not work out in the way that everyone had hoped. Wartime cooperation among the allies broke down into the Cold War."[67] One scholar notes that:

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60. UN Conference Commission III, *supra* note 1, at 13 (quoting the address by Mr. Morgenstierne (Norway)).

61. *Id.* at 25 (quoting the address by Mr. Dejean (France)).

62. Krasno, *supra* note 1, at 96.

63. Wouters & Ruys, *supra* note 15, at 164.

64. UN Conference Commission III, *supra* note 1, at 122 (citing the address by Dr. Evatt (Australia)).

65. *Id.* at 123.

66. *See* Wouters & Ruys, *supra* note 15, at 145 (stating that "257 vetoes have been cast in the period between 1946 and 2004.").

67. Tickell, *supra* note 59, at 307-08.

> Far from being a forum in which they could cooperate in coping with post war problems, the United Nations, and the Security Council in particular, became a battleground between East and West in which the West faced seemingly endless vetoes from the Soviet Union. By 1968 when the Soviet Union vetoed a resolution which would have condemned its invasion of Czechoslovakia, they had used the veto no fewer than 100 times. This East/West rivalry polarized and paralyzed international activity, most acutely before the death of Stalin. The sole, aberrant, exception was over the Korean War when the Soviet Union made the fatal mistake of absenting itself from the Security Council, thus allowing the West to put together an intervention force to fight on South Korea's behalf. This is the only example of the Security Council acting with military force in a way envisaged in the Charter.[68]

Nevertheless, it would appear that, ultimately, the delegates were swayed by the idea that unless all the great powers supported certain decisions—especially those relating to the use of force—there was no chance of success in creating an effective U.N. As the Australian delegate put it, "[i]t is understandable that unanimity may reasonably be required when the Council has to make a decision to use force, since the permanent members of the Council will be expected to take a prominent part in the application of force."[69] It was hoped that the great powers would use their veto power with great restraint,[70] but there was no guarantee that they would always do that. For the United States in particular, however, their essential argument can be summed up by U.S. Senator Connally's statement at the conference:

> We believe that the Security Council when united, can preserve peace; we fear that if it is not united, it cannot preserve peace. Therefore, we are voting and did vote for those measures that would contribute to the continued unity and harmony among the permanent members of, the Security Council, in order that their powers and their prestige may be utilized in behalf of peace. It was essential that the Organization be endowed with a relatively small, powerful executive authority. That is the Security Council. The voting formula, in brief, is much more liberal than that adopted by the League of Nations, in which it was required that there be complete unanimity.[71]

With regard to any potential abuse of the veto by the great powers, Senator Connally offered the theory that "they [permanent SC members] will be sensible of that sense of responsibility and that they will discharge the duties of their office not as representatives of their governments, not as representatives of their own ambitions or their own interests, but as representatives of the whole Organization in behalf of world

68. *Id.* at 308.

69. UN Conference Commission III, *supra* note 1, at 123 (quoting the address by Dr. Evatt (Australia)).

70. *Id.* at 127 (noting that "[t]he great powers can perform, a great service to the world if they demonstrate in practice that the special power of veto given to each and every one of them individually under this Charter will be used with restraint and in the interest of the United Nations as a whole.").

71. *Id.* at 131 (quoting the address by Senator Connally (United States of America)).

peace and in behalf of world security,"[72] adding:

> Fifty nations would not permit the arbitrary or willful use of the powers of the Security Council when it was adverse to the interests of all of the Organization or of world peace. And so I do not believe that that can occur. Let me say, furthermore, that if there should be one recalcitrant member of the Security Council, with four other members sitting by his side and counseling and warning him as to the course … to pursue, and with six other members elected by the Assembly, the moral influence, the pressure, and the prestige of these other members would make him think many times before that power should be used arbitrarily or willfully.[73]

However, that moral influence would be insufficient restraint on the use of the veto. In fact, the framers of the Charter continued to worry about the potential of abuse. For example, delegate Loudon of the Netherlands said, "[w]e have been asked repeatedly to have confidence and faith in the permanent members of the Security Council. Our answer is: '[c]onfidence and faith we have, or otherwise we would not acquiesce. We hope and we trust that the future will justify our course.'"[74] Additionally, the delegate from Columbia predicted the possibility of ineffectiveness of the SC, stating, the "unanimity rule or the vote of the permanent members of the Council should not be obligatory even if highly desirable. It [Columbia] believes that the obligatory unanimity will make effective action by the Council impossible because it can be blocked by the vote of a single permanent member."[75] At the same time, even those countries opposed to the veto power recognized that "the states here represented do not want and cannot deny to the five great powers upon whose shoulders rests the heaviest weight of the maintenance of peace and security in the future the instrument which they consider essential."[76] Ultimately, the delegates granted veto powers to the great powers, because of "a tremendous amount of confidence in the certainty that the veto shall not be applied except in exceptional cases."[77]

Some delegates hoped that the possibility of amendment of the Charter would remedy any future abuse of the veto. As the Peruvian delegate acknowledged, "we were presented with the dilemma of a Charter with the veto or no Charter at all. In consequence we decided to propose that the Charter be subject to easy and just amendment in the future and at the same time that if such amendment does not pass a nation may have the right to withdraw."[78] But, as it turned out, the amendment process itself would not be that easy.

Ultimately, the five great powers insisted on the veto power and as the New Zealand delegate put it, the "question of the rule of unanimity or a question of the veto … was a question of organization; a new world organization or no world

72. *Id.*
73. *Id.* at 131-32.
74. *Id.* at 164 (quoting the address by Mr. Loudon (The Netherlands)).
75. *Id.* at 165 (quoting the address of Mr. Lleras Camaroo (Columbia)).
76. *Id.*
77. *Id.*
78. *Id.* at 166 (quoting the address of Ambassador Belaundo (Peru)).

organization."[79] At that time, the nations were desperately searching for a way to stop another world war. They simply had to succeed in bringing the United Nations organization into existence, however defective. In the words of the Indian delegate, "[w]e realize as earnestly as anyone else in this Conference that it is vital to bring into existence an organization however defective on which the hopes the aspirations of the people of the world depend."[80]

Ultimately, only fifteen out of the fifty countries that attended the conference abstained from the vote on granting veto powers to the five SC permanent members.[81] Most delegates accepted the reality that in the community of nations there existed some nations that precisely because of their economic and military prowess would be first among equals, the principle of sovereign equality notwithstanding. The Prime Minister succinctly captured the mood of the conference:

> [T]hey [great powers] said, "But as a precondition we … cannot place our countries under even the most democratic vote of all the nations even under a two-thirds or a four-fifths or a nine-tenths. We the five powers who have the power cannot put that power and our forces and our resources at the disposal of the body unless we are all agreed". Then the question was raised what will happen if in its own interest one of the powers who may break the rules of the Charter and want to break out in aggression after everybody is convinced that they are wrong and that they are morally convicted of aggression should defy not only the Security Council and the Assembly but the world? What will happen then? Again the representatives of the larger nations were frank when they said if that should happen —-we think it is unlikely and we can't see such circumstances arise at the moment but if it did happen then that certainly would mean going outside of the league of the United Nations Organization to deal with it. And it would mean that the Security Council would be really broken up.[82]

The reason for the failure of the League of Nations—predecessor to the U.N.—was that it overemphasized the equality of sovereign states, unanimity,[83] and sought to put every nation at par.[84] Bruce Russett, Barry O'Neill and James Sutterlin, noted that:

> The League had often been immobilized by the requirement for consensus; therefore, a system of majority voting was provided for the council.

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79. *Id.* at 170 (quoting the address of Prime Minister Fraser (New Zealand)).

80. *Id.* at 176 (quoting the address of Sir Ramaswami Mudaliar (India)).

81. *Id.* at 121.

82. *Id.* at 171 (quoting the address of Prime Minister Fraser (New Zealand)).

83. *See* Wouters & Ruys, *supra* note 15, at 142. With regard to the new organization, "[t]he Allied Powers attempted to reassure other countries by pointing out that despite the veto right, the operation of the Council would be less subject to obstruction than was the case under the League of Nations, where unanimity among all members was required." *Id.*

84. The delegates at San Francisco noted that during the era of the League of Nations, "[t]here were, side by side, the League with its principles, its procedures, and its jurisdiction, and parallel to it and in rivalry with it, arrangements made for settlement which did not, as we know, conform to the great principles of the League of Nations." U.N. Conference Commission III, supra note 1 (citing the address by Dr. Evatt (Australia).).

> In the League there had been confusion between the responsibilities of the assembly and the council; therefore, the authority to take action was, in the UN, concentrated in the Security Council. The United States did not join the League in part because it worried that it could not adequately protect its interests; therefore, the right of veto in the Security Council was given to those powers who would share principal responsibility for the maintenance of peace.[85]

Under the League of Nations, decisions on nonprocedural matters required unanimous agreement.[86] Under this dispensation, "each member effectively had a veto."[87] Thus drafters of the Charter, especially the United States, had their "eyes on the past—on the sad experience of the League of Nations."[88] In other words, "[p]roponents of the veto—some of whom would make a virtue of necessity—point out that it represents commendable progress over the League of Nations. In the League Council every one of the 15 members, including the smallest nations with little responsibility for the maintenance of peace."[89] The big nations simply chose not to participate.[90] In the opinion of some scholars, the real reason that the great powers sought to have the veto power in the U.N. organization was to "prevent a council decision authorizing the use of force against them."[91] Some scholars maintain that the veto is one of the reasons for the apparent success of the U.N.:

> But the veto is vital. First, the veto, paradoxically, does more than anything else to ensure that the United Nations bears some resemblance to the real world and is treated seriously as an organisation. Imagine what would happen if there were no veto. Resolutions of mounting fatuity would be passed, instructing the Permanent Members to do things which they had no intention of doing. Through ignoring these resolutions, the leading countries of the world would soon ignore the Security Council, thereby devaluing not only the Security Council but the whole U.N. system.[92]

In sum, the historical backdrop demonstrates that the delegates were cautiously optimistic that the five permanent SC members would not abuse their veto, or if they did the Charter would be amended to address any abuse.

## II. ASSESSING THE EFFECTIVENESS OF THE SECURITY COUNCIL

It may be argued that there is no need for reform unless a compelling case is made that the SC has been utterly ineffective because of the lack of any proposed

85. Russett, O'Neill & Sutterlin, *supra* note 31, at 66.

86. League of Nations Covenant art. 5, ¶ 1.

87. Sellen, *supra* note 25, at 234.

88. Russett, O'Neill & Sutterlin, *supra* note 31, at 66.

89. Wilcox, *supra* note 43, at 54.

90. *See Members Of The League of Nations*, ENCLOPEDIA BRITTANICA, https://www.britannica.com/topic/League-of-Nations/Members-of-the-League-of-Nations, last accessed Dec., 2018 (indicating that big powers such as Germany, the United States of America, and the USSR were either not part of the League of Nations at all or with-drew from the organization before the Second World War).

91. Butler, *supra* note 58, at 10.

92. Tickell, *supra* note 59, at 312.

reforms. This section analyzes the resolutions of the SC in terms of those that have been effective and those that have not been effective in accordance with its essential responsibilities and charge. Under the Charter, the SC is created "[i]n 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 terms of the record of the SC, save for a hiatus at the height of the Cold War[93] and shortly after the end of the Cold War,[94] the East-West divide made for a mostly effective SC. It is noteworthy that "[o]ut of more than 600 resolutions since 1991, the United States has only exercised its veto four times, three to prevent censure of Israel and once to block a second term for then Secretary-General Boutros Boutros Ghali."[95] John Van Oudenaren observes that:

> The period of Cold War deadlock went through two distinct phases. In the first, the United States and its allies generally had the upper hand; the Soviet Union was forced to rely on the veto to defend its interests. Between 1946 and 1965, Moscow used the veto 106 times, compared with none for the United States. In the second phase, this situation was reversed, as the United States and the West were placed on the defensive by the coalition of the communist countries and radicalized developing countries that came to dominate the UN system. From about 1970 (when the United States cast its first Security Council veto) until the end of the Cold War, the United States was the main wielder of the veto, which it used to neutralize attacks on Israel and in relation to other issues. Between

93. John Van Oudenaren, *Effectiveness and Ineffectiveness of the UN Security Council in the Last Twenty Years: A US Perspective*, ISTITUTO AFFARI INTERNAZIONALI (IAI) 4 (2009), http://www.iai.it/sites/default/files/iai0930.pdf. Van Oudenaren observes that,

> Even at the height of the Cold War, however, the Security Council was able to exercise some of what scholars have called its role as both a great power concert and a force for global governance. In 1956, the United States joined with the Soviet Union in supporting two resolutions calling for an end to the military intervention in Suez. France and the UK vetoed these resolutions, but pressure in the Security Council was one of the factors that helped to bring a swift end to the Suez crisis. The Security Council also played a role in containing conflicts in Cyprus and the Congo, in stopping the 1967 Arab-Israeli war, and in providing a venue for the resolution of the first Berlin crisis and the Cuban missile crisis.

94. *Id.* at 5. Van Oudenaren observes that,

> The end of the Cold War meant the end of the post-1945 deadlock in the Security Council. A period of maximum cooperation in the council began with the international response to Iraq's 1990 invasion of Kuwait, which roughly coincided with a number of other momentous events, including the breakup of the Soviet Union, the dissolution of Yugoslavia and the onset of the wars in the Balkans, the reunification of Germany, and the conclusion of the Maastricht treaty establishing the European Union (EU). Between the late summer of 1990 and the early winter of 1991, the Security Council passed a total of twelve resolutions dealing with the Iraq crisis, including ones that mandated, under Chapter VII of the Charter relating to the existence of a breach of the peace or act of aggression, the imposition of sanctions and that authorized the use of all necessary force' should the sanctions fail.

95. Lyman, *supra* note 4, at 131.

> 1966 and 1989, the United States vetoed 67 Security Council resolutions, compared to just thirteen for the Soviet Union.[96]

More recently, a resurgent Russian Federation and an increasingly economically and militarily assertive China has resulted in the SC deadlock. Since the start of the Russian intervention in Crimea, Ukraine in February 2014 (five years), Russia vetoed SC resolutions thirteen times (or 2.6 resolutions per year). Meanwhile, in the same period USA took an opposing position and voted for the same resolutions thirteen times. The current rate of Russian veto exceeds the rate during the Cold War. The USSR only vetoed SC resolutions ninety times (or two resolutions per year while the USA vetoed SC sixty-five times. It is instructive that between 1991 and 2014 (twenty-three years)—when supposedly the Cold War had ended—Russia used the veto only nine times (or 0.4 resolutions per year).[97] It can be said that by 2005, "[t]he dubious honour of having cast the most vetoes goes to Russia (formerly the Soviet Union), which invoked the privilege 122 times. With 80 vetoes, the United States is entitled to the silver medal. Next in line are Britain and France with 32 and 18 vetoes, respectively."[98]

The voting record of the five permanent members of the SC appears to be motivated by ideological, geopolitical and national interests, rather than objectives of the UN and responsibilities of SC.[99] The following illustrations seem to lead to this conclusion. In 2006, USA vetoed a draft resolution "on the Israeli military operations in Gaza, the Palestinian rocket fire into Israel, the call for immediate withdrawal of Israeli forces from the Gaza Strip and a cessation of violence from both parties in the conflict."[100] In 2009, Russia vetoed "a resolution in on the extension of the UN observer mission's mandate in Georgia and Abkhazia."[101] On 4 October, 2012, a draft resolution on the Syrian Arab Republic was put to the vote. The draft was not adopted owing to the negative vote of two permanent members.[102] In fact, "of the eight vetoes China has cast in the Security Council, two have now involved Syria. The first one was in October 2011, when China joined Russia in blocking a Europe-backed sanctions resolution."[103]

Additionally, "[i]n January 2007, China, together with Russia, vetoed a measure imposing sanctions on Burma, a Chinese client state at the time. Then in July 2008, China joined Russia in killing a resolution punishing the Mugabe regime in

96. Oudenaren, *supra* note 93 at 3, 4.

97. *See* U.N. Documentation Guide, *supra* note 32.

98. Wouters & Ruys, *supra* note 15, at 145.

99. *See* U.N. Documentation Guide, *supra* note 32. Several nations have expressed a similar view, noting "that the veto should be used for the benefit of all Member States of the United Nations … on many occasions, the veto had been used to protect national interests." U.N. Working Group Report *supra* note 18.

100. *Subjects of UN Security Council Vetoes*, GLOBAL POL'Y F., http://www.globalpolicy. org/component/content/article/102/40069.html.

101. *Id.*

102. Report of the Security Council, *supra* note 57.

103. Minxin Pei, *Why Beijing Votes With Moscow*, N.Y. TIMES (Feb. 7, 2012), http://www.nytimes.com/2012/02/08/opinion/why-beijing-votes-with-moscow.html?_r=0).

Zimbabwe, another of Beijing's allies."[104] Additionally, the Chinese has used the veto in "ideological hostility to democratic transitions."[105] This conclusion is arrived at on the basis of the fact that during the Arab Spring, attempts to topple dictatorships in the Middle East, the Chinese "propaganda machine has spared no effort in portraying the events in the region in the most negative light. Fearing a similar upheaval in China."[106] On 15 June 2009, the SC voted on the draft resolution, seeking to extend by two weeks the mandate of United Nations Observer Mission in Georgia (UNOMIG) which was to expire on the same day. The resolution received ten votes in favor, one against (Russian Federation), with 4 abstentions (China, Libyan Arab Jamahiriya, Uganda, Viet Nam), and was not adopted.[107]

Perhaps the only exception in recent times is the case of Libya. It is noted that:

> By resolution 1973 (2011), adopted on 17 March by 10 votes to none, with 5 abstentions, the Council demanded the immediate establishment of a ceasefire and a complete end to violence and all attacks against and abuses of civilians, stressed the need to intensify efforts to find a solution to the crisis, authorized all necessary measures to protect civilians, and established a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians.[108]

When national interests were not particularly at stake, the votes tended to be unanimous and in promotion of the purposes and objectives of the U.N. and responsibilities of the SC. Such is the case with regard to Guinea Bissau and Ivory Coast.[109] In this regard, "[e]xpressing its concern at the continuing instability in Guinea-Bissau, the Council by resolution 1949 (2010), adopted unanimously on 23 November, extended the mandate of UNIOGBIS until 31 December 2011. The Council urged the armed forces in Guinea-Bissau to respect the constitutional order, the rule of law and human rights."[110] However, with the Cold War practically making a comeback, the record appears to promote the narrow ideological, geopolitical and national interest. Thus, between 2005 and June 2018, Russia vetoed SC resolutions nineteen times, while the U.S. vetoed SC resolutions five times.[111]

This article would be remiss not to observe that reliable conclusions based exclusively on the agenda items and the voting record may be hard to make based on various complicating factors. It should be noted, for example, that "objective analysis is hampered by the fact that States often fail to provide clarification of their exact

104. *Id.*
105. *Id.*
106. *Id.*
107. Rep. of the S.C., at 3, U.N. Doc. S/PV.6143 (2009).
108. *Id.*
109. *See* S.C. Res. 1949, U.N. Doc. S/RES/1949 (Nov.23, 2010).
110. *Security Council Renews Mandate of United Nations Integrated Peacebuilding Oce in Guinea-Bissau until 31 December 2011*, Concerned at Persistent Instability (Nov. 10, 2010), https://www.un.org/press/en/2010/sc10091.doc.htm.
111. *See* U.N. Documentation Guide, *supra* note 32.

motives for casting a vote."[112] In recent years, China has tended to abstain[113] rather than veto SC resolutions unless it is necessary to go along with Russia or the subject matter is connected to China's national interest.[114] Here, as in other cases, the veto was not used to promote the principles for which the U.N. was established. As Pei observes that "the most important factor in China's decision had little to do with Beijing-Damascus ties, and everything to do with its diplomatic cooperation with Moscow."[115]

Increasingly, a rift exists in the SC that pits the United States and Europe on the one hand and Russia and China on the other. This appears to be driven by national interest and jockeying for global influence. Thus, "[t]he Russia-China axis of obstruction at the Security Council has now become a critical variable in the council's decision-making process. The two countries seem to have reached a strategic understanding: they will act to defy the West together, so that neither might look isolated."[116] Although between 1946 and 2008, China[117] used the veto six times, as its global and strategic interests increase they are more willing to use the veto.

## III. REFORM OF CHARTER PROVISIONS ON THE SECURITY COUNCIL

### *A. The Veto and Difficulty of Amending the Charter*

Commentators have made varied recommendations regarding the reform of the

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112. Wouters & Ruys, *supra* note 15, at 145.

113. Abstention relative to the veto has an ambiguous legal value and there has been no official interpretation of the effect of an abstention. According to Wilcox:

> One problem which was raised at San Francisco but never definitely settled is this: what effect would the abstention from the vote of one of the permanent members have on the principle of unanimity? If a Great Power abstained would the Council nevertheless be able to reach a decision? Or would an abstention serve as a kind of passive veto? In the League Council the practice arose of counting as absent any member that abstained from voting. Under such a procedure it was often possible to obtain a unanimous vote on a measure even though some states did not actively support it."

Wilcox, *supra* note 43, at 55-56. Wilcox adds, "the principle of unanimity is based on the assumption that all of the Great Powers must agree before important action is taken." *Id*. *See e.g.* S.C. Res. 1593 (referring the President of Sudan to the International Criminal Court on which the U.S. and China abstained). *See also* S.C. Res. 1972 (outlining a similar resolution on Libya which China and Russia abstained.). If recent events are to be followed, it can be argued that the practice of the SC itself indicates that they have come to view abstention as passive consent, so to speak. There are series of resolutions on which a member of the veto wielding club simply abstained and yet the resolution was passed, and their legality were not in question. Kirgis argues that "[t]he proviso in Article 27(3)—calling for abstention by a party to a dispute-seems to distinguish abstention from a "concurring vote." The proviso seems to have been regarded originally as identifying a narrow category of cases in which a permanent member's abstention would not stand in the way of a substantive decision." Kirgis argues that "Abstentions are treated as though they were "concurring votes" within the meaning of Article 27(3)." *See* Kirgis, Jr., *supra* note 5, at 510, 537.

114. Pei, *supra* note 103.

115. *Id.*

116. *Id.*

117. Between 1946 and 1971, the Chinese seat on the Security Council was occupied by the Republic of China (Taiwan), which used the veto only once (to block Mongolia's application for membership in 1955). *Changing Patterns in the Use of the Veto in the Security Council*, GLOBAL POL'Y F., http://www.globalpolicy.org/component/content/article/102/32810.html.

SC.[118] The drafters of the Charter agreed that if any of the members of five permanent members of the SC voted against a resolution on substantive grounds, then the resolution would not pass.[119] Hence, the permanent members have the right to veto. This right has resulted in logjam over the years resulting in a less effective SC than the one it was intended to be. Richard Butler noted that to fix the SC one of the critical areas "is the veto, which has been abused by permanent members in defense of interests, client states, and ideological concerns that very often had nothing to do with maintaining international peace and security."[120] But even Butler recognizes that "the veto issue is a vexed one. Clearly, the major powers will not give up their veto power voluntarily, and the charter allows them to block any proposal that it be removed."[121] Some scholars argue that the "veto is essentially immune from reform."[122] Butler proposes that permanent SC members "voluntarily agree to a more constructive interpretation of the veto's nature and the uses to which it may legitimately be put."[123] In other words, Butler focuses on the distinction on substantive and procedural issues[124] and proposes a new understanding of the use of veto power. He propounds that because it is only substantive issues that would require new rules on use of the veto. It would be necessary to "include other understandings on substantive issues."[125] The problem is that this involves what Francis Wilcox calls "the hazy no man's land between procedural and substantive questions,"[126]observing that "it will often be difficult to distinguish between procedural and substantive matters."[127] Kirgis observed that "[t]hree times in the early years the Soviet Union vetoed a preliminary determination that a matter was procedural, claiming that the determination was itself substantive."[128] Additionally, "[t]he official interpretation of the voting procedure which the sponsoring governments issued at San Francisco made clear that any decision taken by the Council to determine whether or not a matter is procedural or substantive is in itself a substantive question and will require the unanimous vote of the permanent members."[129]

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118. *See e.g.*, Kirgis, Jr., *supra* note 5; Butler, *supra* note 58; Caron, *supra* note 21; Russett, O'Neill & Sutterlin, *supra* note 31.

119. Charter, *supra* note 2, at art 27(3).

120. Butler, *supra* note 58, at 10.

121. *Id.*

122. Caron, *supra* note 21, at 569.

123. Butler, *supra* note 58, at 10.

124. The Charter makes a distinction between SC's vote on substantive matters and its vote on procedural matters. It provides that,

> [d]ecisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members. 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; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."

Charter, *supra* note 2, at art. 27, ¶¶ 2, 3.

125. Butler, *supra* note 58, at 10.

126. Wilcox, *supra* note 43, at 53.

127. *Id.*

128. Kirgis, *supra* note 5, at 510.

129. Wilcox, *supra* note 43, at 53.

Perhaps the most important provision that would be the focus of amendment relates to the voting procedure of the SC. The U.N. Charter provides for several organs of the United Nations Organization, the most prominent of which is the SC. Article 24 of the Charter provides:

> 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 discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

This provision embodies the rationale of the delegates who wanted to establish an SC that would deliver promptly and effectively on its objectives. If this objective turned out to be elusive, the Charter of the United Nations provides for its amendment.[130] Realizing that permanent SC members would have their veto, if there was to be any United Nations organization at all, some delegations tried to provide for a mechanism to revisit these provisions.[131] They "expressed the hope that such a revision of the Charter will not be subject to the rule of unanimity of the permanent members of the Security Council."[132] However, it is almost impossible to see how the SC specifically can be reformed based on the provisions relating to the amendment process that is so dependent on the willingness of the five SC permanent members. The Charter provides:

> 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*.[133]

The Charter also provides that "[a] General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly."[134] Additionally, the Charter provides that "[a]ny alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when 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."[135] It was in the interest of stability that the amendment process was

130. Charter, *supra* note 2, at arts. 108-109.
131. U.N. Conference Commission III, *supra* note 1, at 119.
132. *Id.*
133. Charter, *supra* note 2, at art.108 (emphasis added).
134. *Id.* at art. 109 ¶ 1.
135. *Id.* at art. 109 ¶ 2.

made so difficult by the framers of the Charter.[136] In fact, "since 1955, all attempts to convene such a General Conference have failed."[137] In 2000, the General Assembly (GA) resolved to "to achieve a comprehensive reform of the Security Council in all its aspects."[138] But by the end of 2005, the GA was still deadlocked.[139] The 2005 World Summit simply reaffirmed the Charter.[140] That same year, a "high-level panel report commissioned by Secretary-General Annan on United Nations reform released in December 2004, *A More Secure World: Our Shared Responsibility,* took up the idea of a four-year seat in one of its two proposals for Security Council reform."[141]

The difficulty of amending the Charter is evidenced by the dearth of scholarly attention.[142] Indeed, the United Nations also acknowledges that "[t]he most difficult issues concern the categories of membership to be enlarged, the veto and the overall numbers of an expanded Security Council."[143] The most significant hurdle is the requirement that any amendment must be "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.*"[144]

Permanent SC members have strategic global as well as nationalistic interests to protect.[145] It is implausible that any legislature body of a permanent SC member

136. Constance Jean Schwindt, *Interpreting the United Nations Charter: From Treaty to World Constitution*, 6 U.C. DAVIS J. INT'L L. & POL'Y 193, 205 (2000).

137. Winkelmann, *supra* note 14, at 84.

138. G.A. Res. 55/2, ¶ 30 (Sept. 8, 2000).

139. *See*, Krasno, *supra* note 1, at 99. According to Krasno, this was because of the clashing of regional and national interests. Krasno writes that "Brazil, Germany, India, and Japan formed the "Group of Four" (G-4) and agreed to seek permanent seats as a group without requesting the veto," "Italy, Mexico, Spain, Argentina, Pakistan, Costa Rica, and others formed another group, calling themselves the "Coffee Club," to support Model B, with its four-year renewable seats," "the African Group, with fifty-four members, proposed six new permanent seats to include two from Africa, with the veto," and "China has been working to thwart any Security Council reform that might give Japan permanent Security Council membership." *Id.*

140. *See generally*, World Summit Outcome, G.A. Res 60/1 (Sept. 16, 2005), https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf.

141. Krasno, *supra* note 1, at 99

142. Caron, *supra* note 21, at 569 (observing that "[t]he difficulty of amending the Charter, and hence reforming the veto, can be taken to explain the evolution of the literature. This difficulty also may explain why … literature is comparatively a trickle").

143. U.N. Working Group Report, *supra note* 18.

144. Charter, *supra* note 2, at art. 108 (emphasis added).

145. *See e.g. Russia Vetoes the Abolition of the Veto*, GLOBALPOLICY.ORG (March 24, 1999), http://www.globalpolicy.org/security-council/security-council-reform/32893.html (stating that "[b]road experience gained through the Council's activity convincingly attests to the fact that the Charter provisions governing the scope and application of the veto are crucial to its ability to function effectively and to arrive at balanced and sustainable decisions. Moreover, these Charter provisions facilitate the subsequent implementation of such decisions. That is why Russia continues to firmly oppose any restriction or curtailment of the veto, be it through amendment to the Charter or otherwise"); *See also*, Krasno, *supra* note 1, at 94 (observing that "[p]ractically speaking, not one of the five would approve any measure that would remove itself from the council or take away the power to veto resolutions").

would ratify an amendment—such as a change to the veto power rule[146]—that would likely diminish the clout and influence of a permanent member over world affairs. Permanent SC members are simply "not willing to abandon this privilege."[147] But, even if the veto remains, something has to be done to reform the structure of the SC for it to continue to serve its purpose. As Russett, O'Neill and Sutterlin put it, the question is "whether the authority of the council can long endure if its structure remains unchanged."[148] One of the things that appears plausible is reform of the composition of the Security Council.

### *B. Reforming the Composition of the Security Council*

In terms of the composition of the SC, the Charter explicitly recognized the economic as well as military stature of SC permanent members. The Charter provides that "[t]he Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council."[149] The Charter also provides that:

> The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.[150]

Some commentators argue that the provision referenced above could provide a formula for the addition of more permanent members to the SC.[151] Times have changed significantly since the 1940s when the Charter was adopted. At the time of its adoption, the signatories were primarily concerned with the carnage of war and they wanted to prevent another war,[152] which led them to proclaim in the opening of the preamble that an objective of this document was to "save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to

146. Charter, *supra* note 2, at art. 27 ¶ 3 (providing that "[d]ecisions of the Security Council on all other matters [non-procedural matters] shall be made by an affirmative vote of nine members including the concurring votes of the permanent member").

147. Winkelmann, *supra* note 14, at 78-79 (stating"[i]nstead of abolishing the veto, the proposals are aimed at rationalizing it. Four types of proposals can be distinguished: (aa.) proposals for a clearer definition of the scope of application of the veto; (bb.) proposals for restricting the scope of application of the veto; (cc.) proposals for restricting the manner in which the veto is used; (dd.) proposals for additional provisions regarding the veto").

148. Russett, O'Neill & Sutterlin, *supra* note 31, at 66.

149. Charter, *supra* note 2, at art. 23 ¶ 1.

150. *Id.*

151. Kamrul Hossai, *The Challenge and Prospect Of Security Council Reform*, 7 REGENT J. INT'L L. 299, 303 (2010) (citing Justin Morris, *United Nations Security Council: Prospects for Reform*, 31 SECURITY DIALOGUE 265 (2000); U.N. Secretary-General, *The United Nations Secretary General's High Level Panel on Threats, Challenges and Changes*, ¶ 249, U.N. Doc A/59/565 (Dec. 2, 2004)).

152. Krasno, *supra* note 1, at 93.

mankind."[153]

At that time, there were few countries with nuclear capability and only a handful were economic and military powerhouses. Since the inception of the U.N., the emergence of Brazil, Japan, Germany and India, among others, as economic and/or military powers changes the dynamic. Before India and Brazil, there was "Japan, with the status of a global economic power and second largest contributor to the UN, pressed for permanent membership, as did Germany."[154] The main argument in support of increasing the composition of the SC is that:

> [I]f economic strength is given its full weight … Germany and Japan together are now able to offer a contribution to the maintenance of international security comparable to that of the United States … . Japan, as the second largest economic power and second largest contributor to the UN, is making a strong case for permanent membership on the ground of 'taxation with representation.' Germany has staked a similar claim.[155]

This matters because "if Germany and Japan are denied this status, their willingness to make the large financial contributions needed, and ultimately greater military ones as well, will likely be undermined."[156]

The reasons for proposing Japan, Germany and other similarly situated countries, to becomes SC members are not without historical precedent. Scholars have noted that "[t]he United States, the United Kingdom, the U.S.S.R., France, and China were made permanent members of the council in 1945 as the most powerful countries at the time and the ones expected to bear the brunt of defending peace with their armed forces."[157] The criteria used were "gross national product or other economic indicators; population; military prowess; geography, either in terms of size or regional distribution; and/or general international influence."[158]

Some of these factors are still relevant even today. For example, "France and the United Kingdom may claim that their colonial influence, still extant despite the demise of colonialism itself, justifies their permanent position since international influence is the main criterion."[159] During the negotiations for the Charter, it may also have been true that the "the atomic bomb has made the need for Great Power unanimity even more compelling than it was."[160] But other countries have gained international influence and nuclear weapons capability. For example, India has nuclear weapons capability while Germany and Japan have international influence that rivals that of Great Britain and France.[161] These developments tend to "upset the

153. Charter, *supra* note 2, at Preamble.

154. Russett, O'Neill & Sutterlin, *supra* note 31, at 65.

155. *Id.* at 68.

156. *Id.*

157. *Id.*

158. Toby D.J. Mendel, *Restructuring the Security Council*, 1 DALHOUSIE J. LEGAL STUD. 161, 162 (1992).

159. *Id.* at 163.

160. Wilcox, *supra* note 43, at 61.

161. *See India: Nuclear*, NUCLEAR THREAT INITIATIVE (NTI), https://www.nti.org/learn/countries/india/nuclear/. *See generally*, Toby D.J. Mendel, *Restructuring the Security Council*, 1 DALHOUSIE J. LEGAL STUD. 161 (1992).

existing balance of power within the United Nations."[162]

At the inception of the U.N., there were only a handful of nation states in existence and represented at the negotiation conference.[163] Because of this, the General Assembly (GA) has tried not being oblivious to the need for increased representation. The world has changed a great deal since 1945, politically[164] and economically. There is the possibility that SC permanent members may be more willing to accept changes, as more countries like Brazil, India, Germany and Japan increase their economic and political leverage internationally. As U.N. Secretary General Kofi Annan observed, "[t]he Security Council must be broadly representative of the realities of power in today's world."[165] To this end, he proposed that in accordance with Article 23[166] of the Charter, there should be an increase in

> [t]he involvement in decision-making of those who contribute most to the United Nations financially, militarily and diplomatically, specifically in terms of contributions to United Nations assessed budgets, participation in mandated peace operations, contributions to voluntary activities of the United Nations in the areas of security and development, and diplomatic activities in support of United Nations objectives and mandates. Among developed countries, achieving or making substantial progress towards the internationally agreed level of 0.7 per cent of GNP for ODA should be considered an important criterion of contribution.[167]

The GA has had on its agenda the "[q]uestion of equitable representation on and increase in the membership of the Security Council" and in December 1992 invited member states to submit written comments "on a possible review of the membership of the Security Council."[168] More than one hundred states provided their views."[169] The nations were responding to issues such as membership, increased transparency, closer cooperation between the Security Council and the GA, wider consultations with regional organizations, and limitation of the right of veto enjoyed by the permanent members.[170] It is noteworthy that as soon as discussion at the United Nations "turns to considering how many states should be added, or which ones, any apparent consensus evaporates."[171] Some scholars recommend that if the

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162. Wilcox, *supra* note 43, at 62.

163. *Member States*, UNITED NATIONS, http://www.un.org/en/member-states/ (Aug. 1, 2018). The number of member states of the United Nations in 1945 was 51. By 2011, that number had almost quadrupled to 193. *Id.*

164. *Id.* While the Charter was negotiated by only 51 nations, the current membership of the United Nations is 193.

165. Annan, *supra* note 19.

166. Charter, *supra* note 2, at art. 23 ¶1 (providing that "[t]he Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council.").

167. Annan, *supra* note 19.

168. Russett, O'Neill & Sutterlin, *supra* note 31, at 1 (citing, U.N Gen-eral Assembly document A/48/264)

169. *Id.*, at 65.

170. *Id*.

171. *Id.*

"logjam is to be broken, it is time to review various proposals from the point of view of the interests they represent and try to design a package that would respond to at least the minimum interests of all."[172]

This minimalist approach focuses only those areas where there is overlapping consensus. If each region is to be represented among the permanent members, Africa, Asia, and Latin America are likely to have great difficulty in finding a mechanism by which the permanent members from their respective regions would be allocated.[173] Longstanding regional rivalries—between Pakistan and India, or among Argentina, Mexico, Brazil, and between South Africa and Nigeria could pose a real problem in terms of choosing the regional representatives.

Some scholars have proposed that regional organizations such as the African Union or Organization of American States could work out a solution. For example, "permanent seats allocated to Africa should be assigned to countries on the decision of the Africans themselves, in accordance with a system of rotation based on the criteria of the OAU currently in force and subsequent elements which might subsequently improve those criteria."[174] This is "concept of permanent regional representation,"[175] which was once proposed by Malaysia, according to which "[a]ny country in a region could serve in the permanent seat."[176] This proposition tends to ignore economic and military factors and might not be acceptable to current permanent SC members.

Former U.N. Secretary General Kofi Annan recommended two models of reform of the SC: "Model A provides for six new permanent seats, with no veto being created, and three new two-year term non-permanent seats, divided among the major regional areas"[177] and "Model B provides for no new permanent seats but creates a new category of eight four-year renewable-term seats and one new two-year non-permanent (and non-renewable) seat, divided among the major regional areas."[178]

Some scholars have opposed the idea of "permanent regional, rotating seats" because while "there are developing states that are emerging world powers, they are not yet sufficiently developed to undertake the tasks that would be required to make them effective permanent members."[179] The rotating basis, that simultaneously takes into account economic and military considerations, makes sense because "[n]o one state in any of the regions would be a completely acceptable representative for that

172. *Id.* at 66.

173. Krasno, *supra* note 1, at 95. Krasno further stated that,

> [a]lthough giving permanent seats to India to represent Asia, Brazil to represent Latin America, or South Africa to represent Africa, sounded promising initially, other countries in the regions challenged this proposal, claiming that these continental giants did not necessarily represent the interests of others in the region. In fact, they might take advantage of their newfound prominence in the Security Council to solidify their local hegemony."

174. Winkelmann, *supra* note 14, at 64.

175. *Id.* at 65.

176. *Id.*

177. Annan, *supra* note 19, at 43.

178. *Id.*

179. Kelly, *supra* note 7, at 338.

region."[180] For example, "India's presence on the UNSC [United Nations Security Council] would also likely be contested by Pakistan."[181] It remains necessary, however, to "devise the alternative arrangement of voting that will both facilitate such a change and make it successful."[182] If current permanent members of the SC are willing to accept new permanent members, they will probably be amenable to accepting the extension of the veto right to those new members as well.

There are counterarguments to expansion of the SC that need to be considered. One of the counter-arguments is that the SC would continue to be undemocratic and not sufficiently inclusive. This argument underscores the difficulty of limiting the number of new economically and militarily advanced countries that would need to be added to the SC once the doors to a more inclusive SC are opened. Increasing the composition based on economic considerations is opposed by some countries. For example Italy, insists that the economic premise "would be neither equitable nor democratic."[183] Additionally, "Italy argues that Germany's ascension would produce three Western European permanent members, excluding Italy which has contributed more peacekeepers than any other country, and which has a larger economy and makes a greater contribution to the United Nations than the United Kingdom."[184] In sum, even if more economically advanced countries were included on the SC, the underlying and fundamental problem would remain: SC would remain an exclusive club of the more powerful nations, which other nations view as largely unrepresentative and arrogant, trying to monopolize global power.[185] As some commentators have noted, "[c]oncerns for decision-making efficacy have clashed with those for legitimacy … . The dilemma is how to resolve that contradiction without weakening the newly achieved capacity of the UN often to act decisively, if not always wisely, on behalf of international peace and security."[186]

At the same time, there are concerns regarding "whether in an enlarged form it [SC] would retain the effectiveness on which its authority also depends."[187] Former Secretary General of the United Nations, Kofi Annan argued, that changes to the SC "should not impair the effectiveness of the Security Council."[188] If the current structure of permanent and non-permanent members of the SC is retained, it may be necessary to reduce the number of non-permanent members in the interest of efficiency. However, if there is no change to the number of permanent members, then it is worth-considering the views of those who have, for example, advocated for the expansion of "the nonpermanent membership … to sixteen, for a total council body of twenty-one … [because] such expansion of the council is essential to meet the wish of smaller states for some greater opportunity to serve as members."[189]

180. *Id.* at 345.
181. *Id*.
182. Caron, *supra* note 21, at 570.
183. Winkelmann, *supra* note 14, at 64.
184. Lyman, *supra* note 4, at 139.
185. Russett, O'Neill & Sutterlin, *supra* note 31, at 65.
186. *Id.* at 67.
187. *Id.* at 66.
188. Annan, *supra* note 19, at 42.
189. Russett, O'Neill & Sutterlin, *supra* note 31, at 76.

There are no perfect solutions. A more representative SC that reflects the current economic, political and military realities would be better than maintaining a structure conceived more than fifty years ago when there were only a few countries in existence. In fact, the five permanent SC members recognize that the SC cannot remain exactly the same due to changed circumstances. As long as the proposed changes are evenhanded and respect the strategic interests of current permanent SC members whose cooperation in the reform process is indispensable. In this respect, "the United States … has expressed strong support for adding Germany and Japan as permanent members and up to three more nonpermanent members."[190] Britain and France have also expressed support for Germany and Japanese candidacy for permanent membership.[191] But these propositions would be non-starters for Russia because Japan and Germany are allies of the United States, France and Britain.[192] In order to balance power on the SC, Russia proposed that Germany and Japan could become permanent members on condition that India too became a permanent member.[193]

### *C. Reforming the Relationship Between General Assembly and Security Council*

Other provisions that would be the focus of reform concern the relationship between the SC and the GA. If the GA were decisively capable of stepping in when the SC is deadlocked, there would probably be no need for any reform of the Charter with regard to the SC. However, one the one hand, the Charter provides that "[i]n 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."[194] On the other hand, the Charter provides that "[w]hile 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 unless the Security Council so requests."[195]

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190. *Id.* at 73-74. Russett, O'Neill & Sutterlin also noted that

> [The United States] has also called for setting the required majority at twelve in an expanded council of twenty. Consequently, instead of five permanent members needing to find four out of ten nonpermanent votes as at present, in the new council the seven permanent members would need five nonpermanent votes out of thirteen. Even if two of the permanent members abstained, only seven nonpermanent votes would be required. The job of finding support would be easier, and the voting power of nonpermanent members, as defined above, would be even less than its current minuscule value.

*Id.* at 74.

191. *Id.* at 74.

192. Russett, O'Neill & Sutterlin observe that this proposition would be a non-starter, anyway. This is because "granting permanent membership only to Japan and Germany, and thereby increasing the already disproportionate representation of the industrialized North, is unacceptable to the non- aligned majority in the UN." *Id.* at 74.

193. *Id.*

194. Charter, *supra* note 2, at art. 24, ¶ 1 (emphasis added).

195. Charter, *supra* note 2, at art. 12, ¶ 1.

The first provision can be read to mean that the SC has the primary, but not exclusive, responsibility for the maintenance of international peace and security. However, the second provision suggests that the GA can only intervene if and when requested by the SC. While the Charter provides that "[t]he General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security,"[196] there is no indication of whether the GA can overrule any negative vote of the SC or a permanent member of the SC.[197] The Charter has other provisions which urge the SC to function in a manner that would not frustrate the objectives of the U.N. more generally, [198] but there is no indication of what would happen in the event it does not.[199]

The International Court of Justice (ICJ) has indicated that the GA may have a role to play in the event that SC is deadlocked with regard to non-enforcement measures, but it did that in the context of a non-binding advisory opinion.[200] This opinion is nevertheless significant—even if to a limited extent—in the event reform of the Charter is not achieved.

The case in point is *Certain Expenses of the United Nations*.[201] This case arose in the context of:

> the manifest failure of the Council to fulfill its tasks as primary actor regarding international peace and security in the Cold War era … [and the] dissatisfaction led UN Member States to adopt the Uniting for Peace resolution in the General Assembly in 1950, providing for an alternative mechanism in the case of Security Council paralysis.202

196. *Id.* at art. 15, ¶ 1.

197. It has been proposed by several nations that "it should be possible to overrule the veto by a two-thirds majority vote in the General Assembly under the 'Uniting for Peace' formula (General Assembly resolution 377 (V) of 3 November 1950) and under a progressive interpretation of Article 24.1." U.N. Working Group Report, *supra* note 18.

198. The Charter provides that, "[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII. Charter, *supra* note 2, at art. 24 ¶ 2.

199. The Charter provides that,

> The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

Charter, *supra* note 2, at art. 11 ¶ 2. Beyond reiterating the effect of Article 12 of the Charter, this provision does not categorically state what would happen if the SC is deadlocked. *See Id.*

200. *See* Schwindt, *supra* note 136, at 200-201 (observing that "neither the requesting organs nor member states are bound to comply with the Court's advisory opinion" and "decisions by the International Court of Justice have reiterated this lack of power" to review acts by organs of the United Nations.").

201. *Certain Expenses of the United Nations*, 1962 I.C.J. Rep. 151 (July 20).

202. Wouters & Ruys, *supra* note 15, at 153.

The *Certain Expenses Case*[203] sought to determine the validity of this resolution. Because the SC could not act due to the Cold War gridlock, the GA adopted certain resolutions pertaining to expenses in connection with the maintenance of international peace and security.[204] The issue before the ICJ was whether the expenditures authorized by the GA to cover the costs of the United Nations operations in the Congo (ONUC) and of the operations of the United Nations Emergency Force in the Middle East (UNEF), constituted "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter.[205]

The former Soviet Union argued that expenses "resulting from operations for the maintenance of international peace and security, are not "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter.[206] The expense fall exclusively to the Security Council for dispersal, "and more especially through agreements negotiated in accordance with Article 43 of the Charter."[207] The ICJ opined that, however,

> The responsibility conferred is "primary", not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24, "in order to ensure prompt and effective action" … [i]t is only the Security Council which can require enforcement by coercive action against an aggressor… . Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with "decisions" of the General Assembly "on important questions."[208]

In sum, the ICJ determined that the GA may legally be involved regarding measures concerning international peace and security measures, subject to the limitation in Article 12(1) of the Charter. That is, the SC has exclusive authority over coercive or enforcement actions. Essentially, the ICJ reaffirmed the Security Council's "primary place ascribed to international peace and security."

The Charter indicates that the GA may discuss issues of international peace and security, but its resolutions on those issues are mere recommendations.[209] Although

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203. *Certain Expenses of the United Nations*, *supra* note 201, at 157.

204. See, G.A. Res. 1583 (XV) (Dec. 20 1960) and G.A. Res.1590 (XV) (Dec. 20 1960); G.A. Res. 1595 (XV) (Apr. 3 1961); G.A. Res. 1619 (XV) (Apr. 21, 1961); G.A. Res. 1633 (XVI) (Oct. 30, 1961); G.A. Res. 474 (ES-IV) (Sept. 20, 1960); G.A. Res. 1599 (XV) (Apr. 15, 1961), G.A. Res. 1600 (XV) (Apr. 15, 1961), and G.A. Res. 1601 (XV) (Apr. 15, 1961); G.A. Res. 1122 (XI) (Nov. 26, 1956); G.A. Res. 1089 (XI) (Dec. 21, 1956); G.A. Res. 1090 (XI) (Feb. 27, 1957); G.A. Res. 1151 (XII) (Nov. 22, 1957); G.A. Res. 1204 (XII) (Dec. 13, 1957); G.A. Res. 1337 (XIII) (Dec. 13, 1958); G.A. Res. 14.41 (XIV) (Dec. 5, 1959); G.A. Res. 1575 (XV) (Dec. 20, 1960).

205. *Certain Expenses of the United Nations*, *supra* note 201, at 152, 156.

206. *Id.* at 162.

207. *Id.*

208. *Id.* at 164.

209. The Charter provides that,

> The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security

in the *Certain Expenses* case the ICJ seems to argue that the GA can make decisions regarding international peace and security, the Charter clearly indicates that those decisions are in fact recommendations.[210] Additionally, the ICJ further opined that "[t]he Assembly does not have to defer to the Security Council under Article 11(2) of the Charter unless enforcement action is necessary."[211]

The reality is that the GA only makes recommendations to the SC, and the SC is not obligated to refer any matter to the SC for final resolution in the event it is deadlocked. The Charter unambiguously states: "[w]hile 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 unless the Security Council so requests."[212] All that the GA can do on its own is "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations."[213]

What might need to change, however, is the configuration of the relationship of the GA and SC to make them co-equal with the possibility of a GA override in the event of SC logjam, assuming that this proposal is acceptable to permanent SC members. According to the current structure, the SC is configured to function as the "executive agency for the whole Organization."[214] Ingo Winkelmann has noted the efforts aimed at strengthening the General Assembly.[215] The idea would be to create a sort of "participatory governance."[216] This is a fundamental challenge because much of the Council's agenda is 'urgent,' or can be argued to be urgent."[217]

Reconfiguring the relationship of the SC and GA also might assuage the concerns of those who argue that the SC should not be legislating for the rest of the world without consultation with the more representative body—the GA. Chapter VII

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> Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make *recommendations* with regard to any such questions to the state or states concerned or to the Security Council or to both.

Charter, *supra* note 2, at art.11¶ 2. The Charter provides that,

> The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make *recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

*Id.* at art. 10. (Emphasis added).

210. The Charter provides that "decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security." Charter, *supra* note 2, at art. 18 ¶ 2.

211. Kirgis, Jr., *supra* note 5, at 534.

212. Charter, *supra* note 2, at art. 12 ¶ 1.

213. *Id.* at art. 14.

214. Fernbach, *supra* note 52, at 123.

215. Winkelmann, *supra* note 14, at 56-57.

216. Caron, *supra* note 21, at 575.

217. *Id.* at 576.

"Security Council's adoption of resolutions that impose far-reaching, binding obligations on all 191 U.N. Member States"[218] is of concern to critics who argue SC engages in a form of "global legislating."[219] Critics maintain "that having the Security Council, a fifteen-Member body not accountable to other U.N. organs, impose obligations on all 191 members threatens to weaken one of the cornerstones of the traditional international law structure, namely, the principle that international law is based on the consent of States."[220] Critics believe that the current configurations amounts to "deviating from the traditional method of creating multilateral obligations, namely, the intergovernmental treaty-making process."[221]

The question that arises is whether the so-called "global legislating" or legal hegemony,[222] is consistent with the overall purpose of the Charter. At first glance, it seems global legislating is mandated by Article 25 of the Charter, pursuant to which U.N. member states "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[223] Further, it appears that "UN Charter Articles 41 and 42, buttressed by Articles 25 and 48, clearly authorize the Security Council to take legislative action."[224] The ICJ had had the opportunity to comment on the SC's legislative authority. In *Namibia* Advisory Opinion,[225] the SC issued Resolution 276 calling on all states to refrain from any dealings with South Africa. The ICJ held that this directive was binding on all member states under

218. Eric Rosand, *The Security Council As "Global Legislator": Ultra Vires Or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542, 542 (2004-2005).

219. *Id.*

220. *Id.* at 544.

221. *Id.* at 548.

222. Daniel H. Joyner, *The Security Council As A Legal Hegemon*, 43 GEO. J. INT'L L. 225, 227 (2011-2012) (arguing that in regard to filling in gaps in existing international treaties, especially within regard to countries that are non-signatories to Nuclear Nonproliferation treaties, "[T]he Security Council appears now to consider itself to possess ultimate and essentially unlimited legal authority-i.e. to represent something of a legal hegemon-by virtue of its UN Charter mandate to maintain and restore international peace and security.").

223. U.N. Charter art. 25. *But see*, *id.*, at 235-36. Joyner observes that

> However, the fact that, under this provision, members agree to accept and carry out the decisions of the Security Council "in accordance with the present charter" suggests that the measure of this obedience should be contingent upon the validity of the Council's decisions and actions as held up to the standard of the provisions of the Charter, and further that it is conceivable that other provisions of the Charter might in some cases take precedence over conflicting Security Council decisions.

*Id.* So it is imperative, for example, that the SC pays attentions to the limitations contained in Articles 11(1) and 25 of the Charter). Joyner argues that the SC has no basis to act as if "[I]t is essentially unbound by law, whether UN Charter law or otherwise, in its fulfillment of its broad and vague mandate to maintain and restore international peace and security." *See id.* at 251. In addition to Jus Cogens norms which the SC would not be able to contradict, Joyner cites a European precedent (Cases C-402/05 P, C-415/05 P, Kadi v. Council, 2008 E.C.R. 1-6351, 3 C.M.L.R. 41) for the proposition that "the UN Security Council cannot override domestic law when that domestic law contains fundamental legal rights." *Id.* at 254.

224. Kirgis, Jr., *supra* note 5, at 520.

225. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep. 16, 58 (June 21) [hereinafter *Namibia*].

Article 25.[226]

An example of this "global legislating" activity is the creation of "an *ad hoc* criminal tribunal for the former Yugoslavia to prosecute those responsible for committing serious violations of international humanitarian law."[227] The SC "adopted a statute deciding both the substantive and procedural rules to be applied by the Court."[228] Article 29 of the International Criminal Tribunal for the Former Yugoslavia (ICTY) statute, for example, requires states to cooperate with the tribunal and Article 9 of the ICTY statute "States must stay or defer domestic criminal proceedings for cases falling within the ICTY's jurisdiction when requested by the ICTY to do so."[229] Some members of the United Nations argued that they "would have preferred the initiative to establish a criminal tribunal to have been brought to the attention of the U.N. General Assembly."[230] The establishment of the International Criminal Court, it was argued, would "obviate the need for the Council to establish future *ad hoc* tribunals."[231] But when the validity of these statutes where challenged, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that Council had the authority under Article 41 to establish the Court.[232] Because the courts (ICJ and ICTY) are unanimous in their view that the SC has legislative, albeit contested, authority there is need to address the issue of the role of GA in SC's legislative decisions that bind all nations with little or no input of the SC.[233] But because of the potential of increased inefficiency, increasing the permanent membership of the SC could be the solution as that would increase perceived legitimacy of SC legislative action.[234]

### *D. Relationship Between Security Council and International Court of Justice*

Beyond restructuring the SC's composition and veto power, the next issue is whether SC's legislative powers could be subject to ICJ's judicial review. The issue is "whether it is appropriate for the Council, a small and unaccountable political body, whose decisions are immune from judicial review, to create far-reaching legal obligations for the entire international community."[235] If the GA has little or no impact on SC's global legislating should the ICJ have the power to review the SC's

226. *Id.*

227. Rosand, *supra* note 218, at 563.

228. *Id.*

229. *Id.* at 564.

230. *Id*. at 566.

231. *Id.* at 567.

232. *Prosecutor v. Dusko Tadić*, Case IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 35-36 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

233. Several nations have expressed the need for "strengthening the legislative role of the General Assembly." U.N. Working Group Report, *supra note* 18, at 25 ¶ 45

234. Rosand, *supra* note 218, at 578 (noting that "Expansion of Security Council membership to make it more representative and reflective of current political realities will help allay legitimacy concerns.").

235. *Id.* at 573.

resolutions regarding their consistency with the Charter? The issue is really whether the power of the SC is untrammeled, allowing it to override international law. Some scholars, like Reisman, contend that SC's power is unlimited because of the discretion granted to it in order to execute its responsibility regarding international peace and security.[236] But other commentators contend that the powers of the SC were not intended to be used in that manner.[237] To support this argument, Orakhelashvil refers to the opinion of Judge Jennings who stated that:

> [A]ll 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.[238]

Orakhelashvil concludes that "the key to understanding the powers of the Security Council lies in understanding their delegated nature."[239] But, beyond the opinion of Judge Jennings, Orakhelashvil makes no reference to original documents or negotiating history for this conclusion, whose corollary proposition is that the decisions (or laws) of the SC can be second-guessed or reviewed by the ICJ. Indeed, as "Professor Reisman has pointed out, it would not be easy for the court to find judicially manageable standards to review the Security Council's exercise of chapter VII enforcement authority."[240] In fact, the legislative history attests to the fact that "attempts at San Francisco to empower the Security Council to refer legal disputes directly to the Court were defeated."[241] One scholar notes that:

> It was recognized at San Francisco that the Security Council, like other UN organs, would interpret Charter provisions relating to its own functions. At the same time, it was understood that if an interpretation by the Council was not generally acceptable, it would be no more binding on members than a comparable interpretation by any other organ.[242]

The problem this involves is that it goes "against the general principle of law: not to be judge of one's own actions."[243]

Further, Orakhelashvil contends that "[i]f the Security Council resolution exceeds its powers by offending the Charter or *jus cogens,* it is open to states to refuse

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236. W. Michael Reisman, *Peacemaking*, 18 YALE L. J. 415, 418 (1993).

237. Alexander Orakhelashvil, *The Acts of the Security Council: Meaning and Standards of Review*, 11 MAX PLANCK Y.B. U.N. L. 144, 146 (2007).

238. *Case concerning questions of interpretation and application of the Montreal Convention arising out of the Aerial incident at Lockerbie (Libya v. UK, Libya v. US)* Preliminary Objections, Judgment of 27 February 1998, I.C.J. Rep. 110 (Feb. 27). *See also*, Orakhelashvil, *supra* note 237, at 147; *Tadić*, *supra* note 232, at ¶ 28 (stating that "In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).").

239. Orakhelashvil, *supra* note 237, at 147.

240. Kirgis, Jr., *supra* note 5, at 518.

241. *Id.* at 509.

242. *Id.* at 527.

243. Katak B. Malla, *UN Security Council Reform and Global Security*, 12 ASIAN Y.B. INT'L L. 31, 36 (2005-2006).

to obey it."[244] But these observations do not seem to be in accord with the intention of the framers of the Charter who clearly wanted to create an all-powerful law-making, as well as political, organ within the U.N..[245] Even if it is true that the Charter did not create the SC to be above the law, this cannot mean that its decisions or laws are subject to revision by another organ. The interpretation of the law must be understood to be left to the same organ, namely the SC. This seems the logical conclusion from the veto power granted to the permanent members of the SC, which could only be undermined by granting to the ICJ the power to review the legality of the SC's decisions. What is being proposed here is to achieve by judicial fiat, what could not be achieved via legitimate legislative reform. Such shortcuts would be of little avail because the decisions of the ICJ would not be implementable without the same SC coming to the aid of the ICJ.[246] It appears that Orakhelashvil too quickly dismisses the observation of the ICJ in the *Namibia* case, according to which "the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned".[247] Orakhelashvil argues that:

> [T]his passage does not rule out the power of judicial review by the Court for at least two reasons. First, in the court indicated that its attitude was based on the limited scope of the request for an Advisory Opinion by the General Assembly. Secondly, the Court has indeed scrutinised certain resolutions in order to respond to the objections put before it."[248]

At least one scholar argues however, that "[i]ndirect judicial review may be possible when the ICJ is asked to interpret or apply Security Council resolutions that one or more parties assert to be procedurally or substantively improper"[249]

If there is justification for the non-reviewability of SC's resolutions, or the non-participation in U.N.'s legislative action, it is because of the need for SC to act with "speed and efficiency."[250] There is greater legitimacy that accrues from consensual treaty-making approach, but at a global level. Such legitimacy can negatively impact efficiency, unless in current circumstances it is possible to achieve the same efficiency while allowing judicial review and GA's participation, which may not have been possible in the 1940s. For example, even "where the General Assembly had reached consensus on the text of a counter-terrorism treaty, States, particularly in the regions where the terrorist threat is probably greatest, were slow to take the necessary domestic steps to become parties to (i.e., be legally bound by) them, thus limiting their practical relevance."[251] So, when particularly confronted with imminent and proximate threats the SC is left with little choice but to fill in the void rather

244. Orakhelashvil, *supra* note 237, at 191.

245. *See generally*, Charter, *supra* note 2, Ch.5.

246. The Charter provides that "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." Charter, *supra* note 2, at art. 94(2).

247. *Namibia*, *supra* note 225, at 45 ¶ 89.

248. Orakhelashvil, *supra* note 220, at 192.

249. Kirgis, Jr., *supra* note 5, at 518.

250. Rosand, *supra* note 218, at 573.

251. *Id.* at 577.

than wait for the slow treaty making process to run its course.

In light of this, it is imperative to advocate for the "[e]xpansion of Security Council membership to make it more representative and reflective of current political realities[, which] will help allay legitimacy concerns, such as those described above, when the Council chooses to act as a 'global legislator.'"[252] Additionally, while the Provisional Rules of Procedure of the Security Council provide that "[u]nless it decides otherwise, the Security Council shall meet in public," [253] "[s]ince the early 1990s, the Security Council … began carrying out most of its work in its closed consultation room, meeting in public only to adopt resolutions already agreed upon."[254] This would also have to change.

There are some who argue that the SC is subject to law because the Charter provides that the a purpose of the United Nations is "to bring about by peaceful means, and in conformity with the principles of justice and *international law*, adjustment or settlement of international disputes."[255] According to Mary Ellen O'Connell, those who argue that the SC is not bound by any laws beyond the principles established in the Charter cite the reasoning used in the *Namibia* case: "[T]he Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter."[256] Even then, this would not be inconsistent with the proposition that SC should be subject to judicial review even if the scope of that review is limited to consistency with principles of the Charter.

It has been observed that the *Lockerbie* case provides probably the most detailed discussion of judicial review of decisions of the SC.[257] In that case, the United States and the United Kingdom intended to ask the Security Council to use its mandatory authority under Chapter VII of the UN Charter to compel Libya to turn over

252. *Id.* at 578.

253. Provisional Rules of Procedure of the Security Council, Rule 48, UN Doc. S/96/Rev.7 (1983).

254. Kirgis, Jr., *supra* note 5, at 518.

255. Charter, *supra* note 2, at art.1 ¶1. (Emphasis added). *See also*, O'connell, *supra* note 12, at 118 (arguing that because "[UN Charter] Chapter I, Article 1(1) does refer to international law." The UN Security Council is bound by international law, beyond the principles established in the Charter.) O'connell also cites to several cases of the ICJ in support of this proposition, namely: Judge *ad hoc* Sir Elihu Lauterpact who stated in the *Genocide Case,* "one only has to state the proposition thus-that a Security Council Resolution may even require participation in genocide-for its unacceptability to be apparent." *See Application of the Convention on the Prevention and Punishments of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro),* Provisional Measures, (1993) I.C.J. Rep. 325 at 440 (Sept. 13) (discussing the separate opinion of Judge Lauterpacht). Judge Weeramantry also stated in the *Lockerbie Case:* "The history of the United Nations Charter thus corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers must be exercised in accordance with well- established principles of international law." *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya* v. *UK; Libya v. US)*, Provisional Measures, Dissenting Opinion of Judge Weeramantry, (1992) I.C.J. Rep. 114 at 65 (Apr. 14).

256. *Namibia, supra* note 225, at 52 ¶ 110.

257. Michael J. Matheson, *ICJ Review of Security Council Decisions*, 36 GEO WASH. INT'L L. REV. 615, 615 (2004).

the suspects in the Lockerbie incident.[258] Unwilling to comply, Libya turned to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention):

> Libya pointed to the provision of the Convention, which provides that a State in which persons who were alleged to have committed such acts of aircraft sabotage were found has the obligation to prosecute or extradite. Accordingly, Libya contended that it had the right to prosecute if it so chose and that it is a violation of the Convention for the United States and the United Kingdom instead to go elsewhere and apply measures designed to compel Libya's surrender of these individuals.[259]

Matheson notes that the "Security Council disregarded the fact that the case was before the ICJ and proceeded to adopt a decision under Chapter VII, requiring Libya to respond to the U.S. and U.K. demands for the surrender of the individuals and imposing a variety of sanctions on Libya."[260] Once the SC adopted those resolutions, the ICJ declined to adopt the provisional measures sought by Libya.[261] The ICJ decided that "at least as a prima facie matter, it assumed that this was a valid decision of the Council, superseding any inconsistent provisions in the Montreal Convention."[262] The case never went to the merits stage, but had it done so then "the ICJ would have been faced with the question of whether it had the authority to review and possibly invalidate decisions of the Security Council under Chapter VII of the Charter."[263] But as Matheson put it, this would have meant the "the possibility of judicial review over a body that is not subordinate to the ICJ but rather has a horizontal relationship to it."[264] However, Matheson notes that "[t]he drafters of the Charter assumed that the Security Council would be making its own judgments on legal issues that might arise in its work, and did not find it necessary to give the ICJ any right of review over Security Council decisions."[265] Matheson adds, "it was clear that the framers of the Charter did not intend to provide for a process of ICJ review of the actions of political decisions. Such a solution was proposed but not accepted at the time of the Charter's drafting."[266]

Matheson refers to at least one case[267] within the U.N. system where an international court came close to claiming the right to review decisions of the SC. In *Prosecutor v. Dusko Tadic*, the "defendant alleged, among other things, that the Security Council's action in creating the Tribunal was invalid as contrary to the

258. *Id.*
259. *Id.* at 616.
260. *Id.* at 617.
261. *Id.* at 615.
262. *Id.* at 618.
263. *Id.*
264. *Id.* at 619.
265. *Id.* (citing Rep. of the Spec. Subcomm. of Comm. IV/2 on the Interpretation of the Charter, at 831-32, U.N. Doc. IV/2/B/1 (1945)).
266. *Id.* at 620 (citing Rev. Summary Rep. of Fourteenth Meeting of Comm. IV/2, at 653, U.N. Doc. 873, IV/2/37 (1945)).
267. *See e.g. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

Charter."[268] Even then, Matheson observes:

> The Tribunal decided it would review that question, but it did so not on the basis of some general assertion of a judicial right to review Council decisions; rather, review was based on the unique situation of the Tribunal, which required the Tribunal to decide whether it was lawfully created so as to comply with the requirement of fundamental international due process in criminal proceedings … . But, with that exception, there has been no assertion by a judicial body of a right to review decisions of the Security Council.[269]

The reason that has been advanced for denying the ICJ the right to review of SC decisions is that

> in crisis situations, there is a definite need for rapid decisions that are authoritative, that will be taken by all parties as being final and binding, and that they cannot hope to reverse through some other process. Otherwise, the effectiveness of the Council in such crisis situations would be seriously compromised.[270]

At least one scholar is of the view that because SC is primarily a political, and not legislative body, its resolutions are not to be taken as legislation in every case.[271] In fact, resolutions are "frequently not clear, simple, concise or unambiguous. They are often drafted by non-lawyers, in haste, under considerable political pressure, and with a view to securing unanimity within the Council."[272] In some cases the SC wants to ensure that the mandatory nature of the resolution is clear and so it may ensure that "the resolution contains or refers to an Article 39 determination, and includes the words "acting under Chapter VII" or reference to an appropriate article thereof, as well as the word 'decides'".[273] But for the most part, the primary concern of the SC is "the need for flexibility if general agreement is to be reached, and as often as not reached swiftly."[274] In light of the way SC resolutions are drafted, and the "fact that for the most part they are intended to have political and not legal effect, it would be a mistake to approach the text as if it were drawn up with the care and legal input of a treaty."[275] According to this view, it would be misplaced to review those resolutions as if they were analogous to treaties or statutes under domestic legislation. In an age that promotes a more democratic and accountable U.N., changes may be necessary to ensure that the SC does not act without any judicial oversight when it remains possible that it may not always act in the interest of Charter principles or consistent with international law more generally.

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268. Matheson, *supra* note 257, at 621.
269. *Id.*
270. *Id.* at 622.
271. Michael C. Wood, *The Interpretation of Security Council Resolutions*, 1998 2 MAX PLANCK Y.B. U.N. L. 73, 79 (1998).
272. *Id.* at 82.
273. *Id.*
274. *Id.*
275. *Id.* at 89.

## IV. RECOMMENDATIONS AND CONCLUSION

### *A. Composition, Veto and Relationship of Security Council with the General Assembly*

Amber Fitzgerald sums up the areas currently considered for SC reform:

> The following are the five main areas of reform currently being discussed regarding increased representation and equality of Member States in the Security Council: 1) adding additional Permanent Members; 2) increasing the overall Security Council membership; 3) changing the veto power; 4) increasing participation in the decision making process; and 5) increasing transparency.[276]

Reform of the SC must take a multi-faceted approach that considers a number of criteria. Any meaningful reforms must bear "in mind the simultaneous goals of legitimacy, representation, accountability, and effectiveness."[277] As Krasno notes, "[w]hile expansion is necessary, there must also be a balance between the need for greater representation and the need to act efficiently. A body that is too large could be unwieldy, rendering it difficult to make timely decisions."[278] Thus it is proposed that "[t]he Council could probably expand somewhat without significantly decreasing its effectiveness."[279]The U.N. has notes regarding the number of Member States of an enlarged SC:

> [P]roposals put forward by Member States have varied, although not considerably. The specific numbers proposed start at 20 but none exceeds 30. Member States proposing a size range have also remained in the 20-30 range, suggesting, for example, an enlarged Council of 15-24 and 24-26. Additionally, those proposing an upper limit for membership of an enlarged Council have also remained in the 20-30 range, proposing, for example, numbers "no greater than 25".[280]

To be reasonable and legitimate, the proposals must not be arbitrary and unprincipled. This article proposes that because of the principle of sovereign equality enshrined in the Charter,[281] it would seem less controversial to increase the number of SC Member States in proportion to the current number of Member States in the United Nations. At the time the Charter was adopted by only fifty-one nations. The current membership of the United Nations is 193.[282] In other words, because the

276. Fitzgerald, *supra* note 16, at 341.

277. Krasno, *supra* note 1, at 95.

278. *Id.*

279. Caron, *supra* note 21, at 567.

280. U.N. Working Group Report, *supra* note 18, at 9.

281. Charter, *supra* note 2, at art. 2, ¶1 (stating The United Nations is based, inter alia, "on the principle of the sovereign equality of all its Members.").

282. Fernbach, *supra* note 52, at 120. A UN Working Group notes that "were 11 members of the Security Council and 51 Member States at the birth of the United Nations in 1945. Council membership at that time represented 21.56 per cent of the membership of the Organization, or a ratio of one Council member to every five Member States." That ratio would be about the same if the SC membership is increased to 42. *Id.*; *see also, Growth in United Nations Membership, 1945-present*, United Nations,

membership of the SC at the inception of the UN was eleven,[283] or 0.22 SC Member States per each of the fifty-one founding nations, the enlarged non-permanent and permanent membership of the United Nations needs to be increased to at least forty-two, that is 193 multiplied by 0.22.[284] A similar approach can be adopted with regard to the permanent membership of the SC. While taking into account the economic and military stature of potential candidates, it is important to note that of the current fifteen members of the SC, only five are permanent members, that is one permanent Member State per every three member states. If the SC is increased to forty-two members, that means that the permanent members need to be increased to fourteen.[285]

Consistent with the criteria of a more equitable SC[286] and cognizant of the changed times in which more economic powers play a bigger role in geopolitics and contribution to the U.N.[287] than when the U.N. was formed about fifty years ago, there would need to be a change to the use of the right to veto.[288] The right to veto

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http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html (last visited Sep. 19, 2018).

283. U.N. Working Group Report, *supra* note 18, at 7. It should be noted that "the membership of the Security Council was increased once. In accordance with General Assembly resolution 1991 (XVIII) of 17 December 1963, the membership was increased from 11 to 15 members, the total increase being in the non-permanent member category." *Id.*

284. *See id.* at 20-21. This idea has been found acceptable to some UN member states. A UN Working Group notes that,

> In 1963, when the Council was enlarged to 15 members and the total United Nations membership was 112, Council membership represented 13 per cent, or a ratio of one Council member to every 8 Member States. Today [2004], with a total membership of 191 Member States, the Council represents 7.85 per cent of the United Nations membership or a ratio of 1 Council member to every 12.5 Member States. Some delegations considered that an expanded Security Council should reflect similar proportions and ratios to those of 1963 (i.e., that the Council should represent 13 per cent of the Organization or a ratio of one Council member to every 8 Member States.

*Id*. at 20.

285. *Id.* at 21, 23-24. The idea of increasing the number of Permanent SC member that also takes into consideration the economic stature of the new members is supported by many nations. *See id*. at 21 (noting that "[m]any speakers expressed support for an increase in the membership of the Security Council in both the permanent and non-permanent categories. A number of delegations proposed that certain Member States from the industrialized and developing countries should assume permanent seats in an enlarged Council."); *see also* United Nations, *Main Organs* (http://www.un.org/en/sections/about-un/main-organs/index.html) (last visited Sep. 19, 2018).

286. *See generally, Growth in United Nations Membership*, *supra* note 282. It should be noted that for all of the emphasis on effectiveness—an overriding consideration for limiting the SC to a few nations and the inclusion of permanent Members of the SC—the body has been largely ineffective. It appears, however, that "[t]he effectiveness of the Council would benefit from an enlargement that would make the Council more representative … efficiency and effectiveness …[have] already lacking in the Council's current configuration." U.N. Working Group Report, *supra* note 18, at 21. In fact, it is possible that "expansion of the Security Council could achieve the goal of legitimacy, without limiting the effectiveness" of the SC. *Id.* at 23.

287. *Id.* at 22. This idea is also supported by the "importance of regional organizations in dealing with matters of international peace and security." *Id.*

288. *Id.* at 23, 28, 30-31. These criteria are explicitly recognized by the Charter, which provides that

of the original SC permanent members could be subject to a two-thirds overrule vote by other members of the other permanent members of the SC.[289] For consistency with the objectives of efficiency and effectiveness of the U.N., an override by a majority of the enlarged SC would be better than an override by a majority of the GA.[290] In effect, this would mean that the countries with the highest Gross Domestic Product (GDP) from each region would have a chance to get on the SC. The original permanent members who would wish to veto a resolution would have to convince their respective allies to avoid a veto override.

It is possible that the five permanent members of the SC may accept this reform. This is because of the possibility that the new SC permanent members would be allies of current permanent SC who are unlikely to vote against their allies. Past voting patterns appear to provide anecdotal evidence that this happen. It has been noted that the U.N. has voting blocs and that the "voting bloc effect … means that the impact of adding new permanent members with veto rights depends heavily on who is added. Germany and Japan vote regularly with other rich industrial states in the General Assembly, and in the Security Council when they happen to hold non-permanent seats."[291] What that means is that "[s]o long as their alignment in international politics holds relatively constant … their acquisition of permanent (and veto-wielding) membership would not fundamentally alter the balance of political forces on the council."[292] So, political alignments across the world might determine who becomes a permanent and veto-wielding member of the SC. So, it really depends on what nations are added to the SC. It is noted, for example, that the 1965 expansion[293] of the SC from eleven to fifteen members actually worked in favor of the permanent and veto-wielding members of the SC because the "required majority

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"[t]he General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution." Charter, *supra* note 2, at art 23, ¶1. There could be additional criteria, such as "the level of financial contribution to the United Nations, size of population, standing and role at the regional level, size of military forces, contributions to peacekeeping operations, as well as accountability." U.N. Working Group Report, *supra* note 18, at 23. It is to be noted that "financial contributions were the most important and scarce asset for the United Nations, and was of paramount importance as an objective criterion." *Id.* at 24-25.

289. U.N. Working Group Report, *supra* note 18, at 6. Several nations have proposed that "the veto should not be abused but should be used with utmost restraint, particularly in authorizing force or implementing sanctions; permanent members should commit to not using the veto when a decision was supported by majority of Security Council members; the use of the veto should be limited to Chapter VII issues only; the veto should not be used on procedural issues." *Id.* at 31. *See also*, Winkelmann, *supra* note 14, at 80.

290. U.N. Working Group Report, *supra note* 18, at 21. This reasoned proposal may provide rationale which several nations where looking for when they recommended that the "possibility of overruling the veto within the Security Council by an affirmative number of votes in an expanded Security Council should be studied." *Id.* at 32.

291. Russett, O'Neill & Sutterlin, *supra* note 31, at 71.

292. *Id.*

293. Kirgis, Jr., *supra* note 5, at 506 (observing that "Articles 23 and 27 were amended in 1965 to increase the membership of the Security Council from its original eleven to its present fifteen, with a corresponding change from seven to nine votes for the adoption of resolutions.").

went up only from seven to nine, meaning that a lower percentage of affirmative votes was needed after expansion (60 percent) than before (63.6 percent). On balance, it was easier for the permanent members to find the remaining votes they needed."[294]

More importantly, however, increasing the number of non-veto members on the SC can also make it more difficult for the permanent and veto-wielding members to use their veto. It is noted for example, that following the 1965 expansion:

> [T]he increase in nonpermanent members also made it easier for the nonaligned to find a nine-vote majority in favor of a resolution opposed by the United States, and thus to force the United States to use the veto … while the United States could usually obtain modification of a resolution by threatening to veto, it was often forced to accept wording it disliked so as to *avoid* using the veto with the adverse political fallout that would entail.[295]

It is imperative, however, to understand that a

> Council hobbled by new veto-wielding or veto-threatening states might not act quickly or decisively in a crisis, or perhaps could not act at all. Much the same effect could be produced if there were a substantial enlargement of even the nonpermanent membership, or a serious increase in the majority threshold. Either of these would greatly complicate the task of assembling sufficient votes to pass a resolution.[296]

With regard to the issue of inefficiency due to increased membership of the SC, this could be avoided by restricting new permanent SC membership of the most economically advanced countries.

If no change is made to the current composition of SC, at least changes could be made with regard to the number of votes required to pass a resolution. Currently under the Charter, nine of the fifteen members must vote affirmatively for a resolution to pass. A higher threshold would increase the power of nonpermanent members. It has also been proposed that there is need to restrict "the scope of issues on which a veto can be cast, or a big rise in the voting threshold, would be required to materially diminish the veto's importance."[297] The effect is that under that scenario nonpermanent SC members would limit the use of the veto by SC permanent members.[298]

Alternatively, the instances in which the veto can be applied could be curtailed. It has been "proposed that the Charter be amended so that, as a first step, the veto power only applies to decisions taken under Chapter VII of the Charter" and that "Article 27 be amended specifically to this end."[299] Ultimately, it is important to note that all that current SC permanent members will most likely not give up their

294. Russett, O'Neill & Sutterlin, *supra* note 31, at 72.
295. *Id.*
296. *Id.* at 73.
297. *Id.* at 71.
298. Kelly, *supra* note 7, at 329-30.
299. Winkelmann, *supra* note 14, at 79.

power in SC easily. The solution may lie in ensuring that SC permanent members retain at least most of their power, in exchange for increasing the effectiveness and legitimacy of the SC. As a group of experts noted:

> The Charter of the UN provided the most powerful states with permanent membership on the Security Council and the veto. In exchange, they were expected to use their power for the common good and promote and obey international law … . In approaching the issue of UN reform, it is as important today as it was in 1945 to combine power with principle. Recommendations that ignore underlying power realities will be doomed to failure or irrelevance.[300]

### *B. Amendments Regarding Role of the International Court of Justice*

It is also important to subject decisions of the SC to judicial review.[301] The ICJ should be able to review the decisions of the SC. But currently, there is no provision that explicitly provides for this step just in case the SC oversteps its mandate or does not act in conformity with the Charter. The Charter provides that "[t]he International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."[302] The Charter also provides that:

> The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question… . Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."[303]

If the ICJ is truly a judicial organ of the U.N. and if the U.N. and its SC are committed to acting in conformity with the Charter in all instances, rather than in furtherance of narrow self-serving national interests of SC permanent members, it should render legally binding decisions rather than mere opinions with regard to SC resolutions and vetoes. The above referenced Charter provisions, as well as related provisions of the Statute of the International Court of Justice,[304] would need to be amended to reflect this recommendation.

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300. Ian Johnstone, *Discursive Power in the UN Security Council*, 2 J. INT'L L & INT'L REL. 73, 90 (2005) (citing Woodrow Wilson International Center for Scholars, *Legitimacy and the Use of Force: Discussion on the United Nations' High-level Panel on Threats, Challenges and Change*, at 64 (2005).

301. *See* U.N. Working Group Report, *supra* note 18, at 29. Some nations have expressed the same idea, proposing to "look into the question of judicial review of cases of broad disagreements between members of the Security Council and the wider membership on whether a decision was ultra vires, or was in keeping within the mandate of the Security Council." *Id.*

302. Charter, *supra* note 2, at art. 92.

303. Charter, *supra* note 2, at art. 96.

304. *See, e.g.* Statute of the International Court of Justice, art. 65, ¶ 1 (providing that, "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.").

### *C. Conclusion*

It is not as if the U.N, has not previously tried to reform the SC. Realizing that eliminating the veto requires the amendment of the Charter and that process too requires the support of the veto permanent members of the SC,[305] U.N. member states have in the past simply abandoned attempted reform efforts. Amending the Charter especially with regard to the composition of the SC and/or veto powers of current SC permanent members or reconfiguring the relationships between the SC and the GA and ICJ should not be viewed as impossible.[306] This paper has attempted to show that opportunities exist for trying again. The five permanent members of the SC realize that their veto may not matter a great deal if the increasingly influential economic powers such as Germany, Japan, Brazil and India do not support the interests that those vetoes are supposed to serve in the first place. As long as those circumstances continue, it will become increasingly plausible to propose changes that include allies of the current SC members on a reconfigured SC, or even to propose to curtail instances in which the veto can be used. In fact, some permanent members of the SC have already expressed interest in moving in that direction. For example, "extension of the veto power is supported by France and Russia,"[307] although the U.S. argues that the veto power should remain with the original permanent five and China the UK have not made a public statement on the issue.[308]

In sum, the veto is premised on a world order that no longer exists.

> [I]t has to be admitted that the current allocation of the veto is a product of the Allied victory in the Second World War and no longer reflects the modern-day distribution of economic and military power. The British and French colonial empires have long ceased to exist and the break-up of the Soviet Union has seriously reduced Moscow's power.[309]

Moreover, more countries now possess nuclear weapons, rather than just the five permanent members of the SC.[310] The Security "Council's five permanent members, with veto power, were supposed to represent the world's power centers. But, there

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305. *See*, Wouters & Ruys, *supra* note 15, at 155 (observing that "the United States and Russia have repeated time and again that they will not accept any limitations to the veto.").

306. There are many other areas that need amendment. But even with regard to those, it is thought that there is no chance for any amendments soon. For example,

> obsolete articles like the superseded names of two permanent members (China, Russia) in Article 23, and like the enemy state clauses (Arts 53 para. 2 and 107) dealing with World War II and the years immediately afterwards, and like Arts 82 and 83 on the Security Council's functions with respect to 'a strategic area' which, together with the rest of the Chapters on Trusteeship (Chapters XI, XII, XIII), have lost their field of application after the emancipation of the last 'strategic area' (Palau).

Tono Eitel, *The UN Security Council and its Future Contribution in the Field of International Law: What may we expect?* 4 MAX PLANCK Y.B. U.N. L. 53, 63 (2000).

307. Wouters & Ruys, *supra* note 15, at 155. *See also*, Lyman, *supra* note 4, at 137-38 (observing that U.S. is open to "Germany and Japan to become permanent members.").

308. Wouters & Ruys, *supra* note 15, at 155-56.

309. *Id.* at 157-58.

310. *Id*. at 158.

are other power centers today not so represented."[311]

At the very least, if there is no reform of the composition of the SC or the provisions on veto power, the relationships of SC with GA and ICJ need to be amended. As long as it becomes increasingly difficult or futile for permanent SC members to try to act unilaterally to protect their national interests in an increasingly changed global order, the permanent members will probably more and more act in furtherance of the objectives of the U.N.. If that is the case, then there is no reason for not amending the Charter to ensure that the SC's resolutions and exercise of the veto are subject to judicial review of the ICJ (or other judicial body created by the U.N.) or overrule by a majority of GA. Under that scenario, the International Court of Justice or the International Criminal Court could be asked for a judicial review especially with regard to SC's primary responsibility of the maintenance of international peace and security.[312]

311. Lyman, *supra* note 4, at 136.

312. Wouters & Ruys, *supra* note 15, at 163 (citing the European Parliament for the proposition that the "possibility must be created of circumventing the veto … should an independent body endowed with legitimacy under international law (for instance, the International Court of Justice or the International Criminal Court) establish that there is an imminent danger of [genocide, war crimes and crimes against humanity] being committed.").