

# Variable Multipolarity and U.N. Security Council Reform

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*One of the fundamental international law questions over the past two decades has been the structure of the United Nations Security Council. In a world of variable multipolarity, whereby changing crises demand different combinations of actors with relevant resources and shared interests, the Council's reform should be based not on expanded permanent membership—as mistakenly held by conventional wisdom—but on inclusive contextual participation in decisionmaking. The Council's five permanent members continue to have collective resources relative to the rest of the world that are not significantly different than at the founding of the United Nations, but are nonetheless insufficient due to the shifting crises. Thus, the Council needs to ensure flexibility of response and, depending on the context, engage with specific regional and local actors. In contrast, increased permanent representativeness (except for limited expansion to include India and Japan) would have little, if any, benefit in enabling the Council to better fulfill its responsibility across all crises and would merely risk increased deadlock. Moreover, the key issue for the international community is clarifying what common purpose the Council should serve. There is both a consensus within the international community that the Council's responsibility under Article 24 of the U.N. Charter should continue to be the maintenance of international peace and security, and a persistent lack of clarity as to the meaning of this obligation in specific crises. Due to the decentralized nature of the international community, without a single Sovereign, this uncertainty cannot be resolved by a purely political decision. Under international law, interpretation of the Council's purpose based on legal analysis of the text, context, and practice of Article 24 can be supplemented by recourse to norms of legitimacy emerging within the international community. If further agreement is reached on the Council's purpose—a process that gives primacy to persuasion and can be improved through certain reforms—the U.N. Charter already provides sufficient legal mechanisms to enable the Council to meet the contemporary expectations of the international community.*

You have to understand that there is  
an element of power in the world,  
but . . . without values,  
power becomes arbitrary and unmanageable,  
so you need both.  
- Henry Kissinger<sup>1</sup>

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1. Interview by Stephen Colbert with Henry A. Kissinger (June 14, 2011), available at <http://www.colbertnation.com/the-colbert-report-videos/389425/june-13-2011/henry-kissinger-pt-1>.

## INTRODUCTION

One of the fundamental international law questions over the past two decades, and an integral issue for U.S. policy, has been the structure of the United Nations Security Council. Although international lawyers and international relations scholars have addressed this topic periodically,<sup>2</sup> existing analyses have been incomplete or require updating for three main reasons.

*First*, reform proposals based on enhancing the Security Council's effectiveness have been premised on inaccurate assessments of current bases of power. The Council's five permanent members—China, France, Russia, the United Kingdom, and the United States (“P-5”)—continue to have collective resources relative to the rest of the world that are not significantly different than at the founding of the United Nations. Indeed, their aggregate power may have actually increased due to the end of the existential conflict between the United States and the Soviet Union that characterized the Cold War.

*Second*, existing critiques have overlooked the primary problem of the Council, which is not insufficient resources or inadequate representativeness, but a lack of agreement as to its purpose. There is both a consensus within the international community that the Council's responsibility under Article 24 of the U.N. Charter should continue to be the maintenance of international peace and security, and a persistent lack of clarity as to the meaning of this obligation in specific crises.

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2. See, e.g., BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE (1998); IAN HURD, AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL (2008); EDWARD C. LUCK, UN SECURITY COUNCIL: PRACTICE AND PROMISE (2006); MICHAEL J. MATHESON, COUNCIL UNBOUND: THE GROWTH OF UN DECISION MAKING ON CONFLICT AND POSTCONFLICT ISSUES AFTER THE COLD WAR (2006); THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY (Bruce Cronin & Ian Hurd eds., 2008); THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 (Vaughan Lowe, Adam Roberts, Jennifer Walsh & Dominik Zaum eds., 2008); Kenneth Anderson, *United Nations Collective Security and the United States Security Guarantee in an Age of Rising Multipolarity: The Security Council as the Talking Shop of the Nations*, 10 CHI. J. INT'L L. 55 (2009); Yehuda Z. Blum, *Proposals for UN Security Council Reform*, 99 AM. J. INT'L L. 632 (2005); Emilio J. Cárdenas, *The United Nations Security Council's Quest for Effectiveness*, 25 MICH. J. INT'L L. 1341 (2004); David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993); Simon Chesterman, *Reforming the United Nations: Legitimacy, Effectiveness and Power after Iraq*, 10 SING. Y.B. INT'L L. 59 (2006); Thomas M. Franck, *United Nations Based Prospects for a New Global Order*, 22 N.Y.U. J. INT'L L. & POL. 601 (1990); Michael J. Glennon, *The UN Security Council in a Unipolar World*, 44 VA. J. INT'L L. 91 (2003); Kara C. McDonald & Stewart M. Patrick, *UN Security Council Enlargement and U.S. Interests*, COUNCIL SPECIAL REPORT No. 59 (2010); Sean D. Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War*, 32 COLUM. J. TRANSNAT'L L. 201 (1994); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993); Steven Wheatley, *The Security Council, Democratic Legitimacy and Regime Change in Iraq*, 17 EUR. J. INT'L L. 531 (2006). Similarly intense debates surrounded the Council's founding and its moments of crisis, such as the Soviet Union's walkout during the Korean War. See, e.g., Leo Gross, *The Double-Veto and the Four-Power Statement on Voting in the Security Council*, 67 HARV. L. REV. 251 (1953); Leo Gross, *Voting in the Security Council: Abstention From Voting and Absence From Meetings*, 60 YALE L.J. 209 (1951); Hans Kelsen, *Organization and Procedure of the Security Council of the United Nations*, 59 HARV. L. REV. 1087 (1946).

*Third*, current analyses have failed to consider future trends in the distribution of power in the world, which is more relevant to the issue of Council reform than past or even present levels of influence. While such predictions are inevitably uncertain, they should nonetheless inform decisionmaking.

While the conventional wisdom has misdiagnosed the sources of the Council's problem as well as the necessary solutions, there is urgent need for reform. The world is characterized by what the Article defines as *variable multipolarity*, whereby changing crises demand different combinations of actors with relevant resources and shared interests. To successfully engage with these shifting crises, the Council needs to ensure flexibility of response and, depending on the context, engage with specific regional and local actors. Therefore, the Council's reform should be based not on expanded permanent membership, but on increased opportunities for inclusive contextual participation in decisionmaking. In contrast, increased permanent representativeness (except for limited expansion to include India and Japan) would have little benefit in enabling the Council to better fulfill its responsibility across all crises, and would risk increased deadlock.

Moreover, the key issue for the international community is clarifying what common purpose the Council should serve. Because of the decentralized nature of the international community, this uncertainty cannot be resolved by a purely political decision; the Security Council must act within the law. Thus, the question of the Council's reform is a prime subject for international law scholars.

The Article is structured as follows. Part I reviews critiques surrounding the Council, demonstrates the limitations of existing reform proposals, and identifies the uncertainty surrounding the Council's purpose as its primary problem. Part II reveals the indeterminacy of conventional legal analysis based on the text, context, and practice of Article 24 in interpreting the Council's responsibility and suggests supplementary means of interpretation from the perspective of norms of legitimacy emerging within the international community. Part III illustrates how shared understandings of the Council's objective are developed based on three case studies, assesses expected future global scenarios in which the Council will exercise power, and recommends unique methods of internal restructuring of decisionmaking in the Council and the General Assembly based on the existing provisions of the Charter. The Conclusion outlines the Article's implications for other decentralized institutions within a broader research agenda.

## I. IDENTIFYING THE SECURITY COUNCIL'S PROBLEM

The end of the Cold War ended the Security Council's paralysis based on the existential conflict between the Soviet Union and the United States, and raised hopes and expectations of the international community for the Council's role, which had previously been ambitious on paper but futile in prac-

tice. Pursuant to the U.N. Charter, the Security Council has had since its inception the “primary responsibility for the maintenance of international peace and security”—a duty conferred by the U.N. member states upon the Council “[i]n order to ensure prompt and effective action.”<sup>3</sup> Yet until 1990, the Council was largely deadlocked and unable to properly discharge its obligations.<sup>4</sup> While the Council’s structure served a narrow meaning of international peace and security during the Cold War by enabling the P-5 countries through their veto power to protect themselves and their interests around the world from Council action and thus to prevent a resurgence of great power conflict, it failed to match the contemporary demands of the world for the Council’s governance role.

The international community’s increased expectations for the Security Council were partially met during the post-Cold War era. Since 1990, as illustrated in Table 1 below, the Council has significantly accelerated its activity at least by one measure, issuing resolutions at an average annual rate of four times its historical average (sixty-four compared to sixteen) and more resolutions in the last sixteen years than in the prior fifty.<sup>5</sup> Notwithstanding this rapid rise in the number of resolutions, the Council has stood at the apex of contemporary global governance only periodically, responding to threats and crises in Kuwait in 1990,<sup>6</sup> Bosnia (albeit belatedly) in 1994,<sup>7</sup> East Timor in 1999,<sup>8</sup> Afghanistan in 2001,<sup>9</sup> and Libya in 2011.<sup>10</sup> While it has been largely a mechanism to manage or prevent crises, the Council has also interpreted broadly its mandate to maintain international peace and security by enacting generally applicable legislation, traditionally viewed to be the sole purview of states.<sup>11</sup> For instance, in Resolution 1373, it required all states—members of the United Nations *vel non*—to prevent and suppress the financing of terrorist acts.<sup>12</sup> Similarly, Resolution 1540 required all

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3. U.N. Charter art. 24, para. 1. This echoed Alexander Hamilton’s argument for a unified and energetic executive in the office of the U.S. president, which would be characterized by “[d]ecision, activity, secrecy, and despatch.” THE FEDERALIST NO. 70, at 392 (Alexander Hamilton).

4. See THE UNITED NATIONS SECURITY COUNCIL AND WAR, *supra* note 2.

5. The resolutions are available at <http://www.un.org/documents/scres.htm>.

6. See S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990); S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

7. See S.C. Res. 836, U.N. Doc. S/RES/836 (June 4, 1993); S.C. Res. 942, U.N. Doc. S/RES/942 (Sept. 23, 1994).

8. See S.C. Res. 1264, U.N. Doc. S/RES/1264 (Sept. 15, 1999); S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

9. See S.C. Res. 1378, U.N. Doc. S/RES/1378 (Nov. 14, 2001).

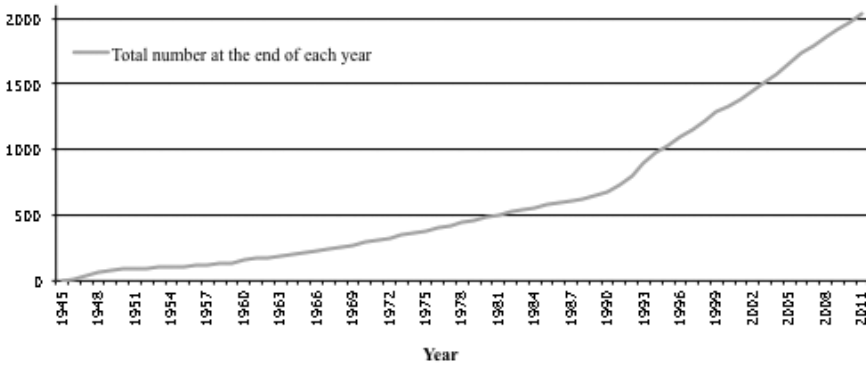
10. See S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

11. See generally Stefan Talmon, *The Security Council as a World Legislature*, 99 AM. J. INT’L L. 175 (2005).

12. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). This issue was previously the subject of the International Convention for the Suppression of the Financing of Terrorism, which was ratified by only four states at the time of the resolution. G.A. Res. 54/109, Annex, U.N. Doc. A/RES/54/109 (Dec. 9, 1999); see Paul Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901 (2002). Also, the ability of the Security Council to bind non-United Nations member states runs counter to the principle of state consent as the basis for rules of international law.

states to refrain from providing any form of support to non-state actors that attempt to develop or acquire nuclear, chemical or biological weapons and their means of delivery.<sup>13</sup>

TABLE 1. SECURITY COUNCIL RESOLUTIONS OVER TIME



With equal if not greater frequency, however, the Council's function has been diminished as it either failed to fulfill its obligation under the Charter—as in Bosnia in 1992<sup>14</sup> and Rwanda in 1994,<sup>15</sup>—or was ignored by other constellations of actors in the international community, as in Kosovo in 1999 or Iraq in 2003.<sup>16</sup> While the system is not necessarily in crisis, it is in need of repair due to the widespread dissatisfaction with the status quo. Though there may be an argument that the Council's contemporary record has ensured its historical purpose of preventing conflict among the great powers, there is a palpable sense that this objective is insufficient and that the Council's inaction in certain crises such as Rwanda and Kosovo was inappropriate given that the contemporary security concerns of the international community are broader from those that motivated the founding of the United Nations.<sup>17</sup> Thus, reforming the Council's structure has been, and remains, a crucial question for international law scholars.

13. S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

14. BRENDAN SIMMS, UNFINEST HOUR: HOW BRITAIN HELPED TO DESTROY BOSNIA (2003).

15. See *infra* Part III.A.

16. See *id.*; see also Anne-Marie Slaughter, *The Use of Force in Iraq: Illegal and Illegitimate*, 98 AM. SOC'Y INT'L L. PROC. 262 (2004).

17. See, e.g., Kofi Annan, Presentation of Secretary-General's Annual Report to the U.N. General Assembly (Sept. 20, 1999), reprinted in U.N. Press Release SG/SM/7136, GA/9596 (Sept. 20, 1999) ("[Kosovo] cast in stark relief the dilemma of what has been called humanitarian intervention: on one side, the question of the legitimacy of an action taken by a regional organization without a United Nations mandate; on the other, the universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences. . . . [T]he core challenge to the Security Council and to the United Nations as a whole in the next century [is] to forge unity behind the principle that massive and systematic violations of human rights—wherever they may take place—should not be allowed to stand. . . . The choice . . . must not be between Council unity and inaction in the face of genocide—as in the case of Rwanda, on the one hand; and Council division, and regional

### A. Conventional Critiques and Reforms

The Council's checkered record of successes and setbacks gave rise to divergent questions regarding its effectiveness and legitimacy. Conventional critiques have identified either the Council's insufficient power or inadequate representativeness as the source of its problem and generally have recommended enlargement of the Council's permanent membership as the solution.

On one hand, some have criticized the Council for lacking power sufficient to fulfill its duty of maintaining international peace and security. For instance, in the aftermath of the war in Iraq launched in 2003, a High-Level Panel, convened by the U.N. Secretary-General Kofi Annan to consider revisions to the U.N. Charter and the Security Council, noted:

Decisions taken and mandates given have often lacked the essential components of realism, adequate resources and the political determination to see them through. The Secretary-General is frequently holding out a begging bowl to implement Security Council decisions. Moreover, the paucity of representation from the broad membership diminishes support for Security Council decisions.<sup>18</sup>

The Panel recommended reforming the Council according to four principles: increasing the involvement in decisionmaking of those who contribute most to the United Nations financially, militarily, and diplomatically; increasing the Council's representativeness, especially of the developing world; not impairing its effectiveness; and enhancing its democratic basis and accountabil-

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action, as in the case of Kosovo, on the other. In both cases the Member States of the United Nations should have been able to find common ground in upholding the principles of the Charter, and acting in defence of our common humanity.”)

18. High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (2004), available at <http://www.un.org/secureworld/report3.pdf>. The High-Level Panel consisted of sixteen senior foreign policy practitioners from around the world: Robert Badinter (France), Member of the French Senate and former Minister of Justice of France; João Clemente Baena Soares (Brazil), former Secretary-General of the Organization of American States; Gro Harlem Brundtland (Norway), former Prime Minister of Norway and former Director-General of the World Health Organization; Mary Chinery-Hesse (Ghana), Vice-Chairman, National Development Planning Commission of Ghana and former Deputy Director-General, International Labour Organization; Gareth Evans (Australia), President of the International Crisis Group and former Minister for Foreign Affairs of Australia; David Hannay (United Kingdom), former Permanent Representative of the United Kingdom to the United Nations and United Kingdom Special Envoy to Cyprus; Enrique Iglesias (Uruguay), President of the Inter-American Development Bank; Amre Moussa (Egypt), Secretary-General of the League of Arab States; Satish Nambiar (India), former Lieutenant General in the Indian Army and Force Commander of UNPROFOR; Sadako Ogata (Japan), former U.N. High Commissioner for Refugees; Anand Panyarachun (Thailand), former Prime Minister of Thailand; Yevgeny Primakov (Russia), former Prime Minister of the Russian Federation; Qian Qichen (China), former Vice Prime Minister and Minister for Foreign Affairs of the People's Republic of China; Nafis Sadik (Pakistan), former Executive Director of the U.N. Population Fund; Salim Ahmed Salim (United Republic of Tanzania), former Secretary-General of the Organization of African Unity; and Brent Scowcroft (United States), former Lieutenant General in the United States Air Force and United States National Security Adviser.

ity.<sup>19</sup> Kara McDonald and Stewart Patrick at the Council on Foreign Relations also focused on the need to enhance the Council's power but argued from the perspective of U.S. interests, contending that without enlargement, the Security Council "will become increasingly ineffective in addressing today's security challenges, which demand cohesive, broad-based multilateral responses."<sup>20</sup> Like the High-Level Panel, they also proposed an approach based on criteria, such as a history of political stability, including a commitment to democratic values; deployable military and civilian capabilities; financial contributions to the U.N. budget and U.N. activities; and demonstrated willingness to use sanctions and force in international interventions.<sup>21</sup> With respect to potential legitimacy concerns, McDonald and Patrick recommended "alternative forums," such as the G-20, to "provide greater input from emerging powers and increased regional parity in global governance"<sup>22</sup> and to thereby ensure greater representativeness.

On the other hand, others have criticized the Council for insufficient representativeness and for exercising too much power in an illegitimate manner. For instance, Burns Weston argued that the Council's resolution authorizing the use of force against Iraq in 1990 in response to its invasion and occupation of Kuwait rested on precarious legitimacy due to "the indeterminacy of the legal authority of Resolution 678; in the great-power pressure diplomacy that marked its adoption; in its wholly unrestricted character; and finally, in the Council's hasty retreat from nonviolent sanctioning alternatives."<sup>23</sup> He contends that, by relying "almost exclusively" on the United States, the Council failed to engage in a "genuinely collective assertion of authority and control dedicated to the restoration of international peace and security."<sup>24</sup> Similarly, Stefan Talmon warned that the "Charter does not establish the Council as an omnipotent world legislator but, rather, as a single-issue legislator" constrained to the maintenance of international peace and security.<sup>25</sup> Moreover, he argued that in practice, "Council legislation is fraught with problems, the most significant being the lack of clarity of the legislative acts and the question of implementation."<sup>26</sup> Therefore, Talmon writes, the Security Council should "legislate only to an extent that reflects the general will of the member states."<sup>27</sup> More recently, the Chinese Ambassador to the United Nations stated that the Council's reform should make "its composition reflect[] the tremendous changes that have taken place in the number and structure of U.N. member-

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19. *Id.* at 80.

20. McDonald & Patrick, *supra* note 2, at 4.

21. *Id.* at 21.

22. *Id.* at 29-30.

23. Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516, 518 (1991).

24. *Id.* at 517-18.

25. Talmon, *supra* note 11, at 182.

26. *Id.* at 192.

27. *Id.* at 193.



ship” and “give top priority to increasing the representation of developing countries, those in Africa in particular.”<sup>28</sup> He further argued that such reform “must reflect the trend of democratization in international relations, and give medium-sized and small countries greater access to the decision-making process of the Security Council.”<sup>29</sup>

Paradoxically, regardless of whether the identified problem is the Council’s deficient or unbounded (and illegitimate) power, the conventional wisdom has held that its reform should be based on increased representativeness through larger permanent membership. Proposed candidates include the so-called G-4 (Brazil, Germany, India, and Japan) or a wider grouping advocated by the Uniting for Consensus coalition (Argentina, Canada, Italy, Malta, Mexico, Pakistan, South Korea, Spain, and Turkey) or by the African Union.<sup>30</sup> For its part, the High-Level Panel proposed expanding the Council to twenty-four members, with either six new permanent seats and thirteen two-year non-renewable seats (Model A) or eight four-year renewable seats and eleven two-year non-renewable seats (Model B), allocated on a regional basis.<sup>31</sup>

Both sets of critiques of the Security Council, and their respective suggestions for reform, turn out to be incomplete, partly due to insufficient clarity as to the theoretical concepts of power and legitimacy that underpin those conventional critiques and partly due to a misapplication of these concepts. While the terms “power” and “legitimacy” have numerous meanings in the scholarly literature (implicit or explicit), this Article defines power as participation in decisionmaking to achieve a specific objective, empirical legitimacy as the shared belief by a decisionmaker and a decision-receiver regarding permissible conduct within a particular community based on common interests, and normative legitimacy as maximization of values of human dignity.<sup>32</sup> In contrast to this substantive view of legitimacy based on common interests, other scholars (typically implicitly) define legitimacy as democracy, legitimacy as procedural fairness, and legitimacy as legality.<sup>33</sup> The conventional prescription for an enlarged Council, despite the divergent identifications of the Council’s problem as insufficient power or legitimacy,

28. Statement of Chinese Ambassador Zhang Yesui, Debate of the 64th Session of the U.N. General Assembly (Nov. 13, 2009), quoted in Zhu Lijiang, *Chinese Practice in Public International Law*, 9 CHINESE J. INT’L L. 607, 655 (2010).

29. *Id.*

30. See, e.g., José E. Alvarez, *In the Era of a New Presidency, a New U.S. Policy Towards the United Nations?: U.S. Policies Towards and in the U.N. Security Council*, 15 ILSA J. INT’L & COMP. L. 319, 319 (2009) (“For at least twelve years, Security Council reformers have proposed many ways to enlarge the size and diversify the composition of that body.”); FASSBENDER, *supra* note 2; Franck, *supra* note 2, at 614–15 (calling for systematic reform of the makeup of the Security Council in order to give other equally significant nations permanent membership).

31. For a detailed breakdown of the two models and regional allocation, see High-Level Panel, *supra* note 18, at 81.

32. See *infra* Part II.B–D; see also Bart M.J. Szewczyk, *European Citizenship and National Democracy: Contemporary Sources of Legitimacy of the European Union*, 17 COLUM. J. EUR. L. 151, 159–64 (2011).

33. See *id.* at 180–97 and works cited therein; *infra* Part I.C.

reflects flaws or logical inconsistencies among the underlying analyses, which the following two sections seek to uncover.

### B. Misdiagnoses of the Council's Power

According to a common refrain repeated in the post-Cold War era, there “is basic agreement that the [C]ouncil, outdated because it reflects the world in 1945 when the United Nations was founded, needs to be expanded to include emerging powers.”<sup>34</sup> This view takes as a premise that legitimacy is epiphenomenal to power and, that the Security Council should therefore reflect contemporary power structures. For instance, McDonald and Patrick argue that the “primary consideration for permanent membership should be power—the ability and willingness to deploy it in service of global security.”<sup>35</sup> This seemingly straightforward argument, however, becomes more complicated when one attempts to list the countries whose power should entitle them to a seat in the Council. Indeed, the actual data are somewhat at odds with the view that global power distribution is drastically different now than it was around the founding of the United Nations when viewed from the perspective of the five permanent members of the Council.<sup>36</sup>

As a proxy for power in international politics, consider the material resources of the P-5 in 1945.<sup>37</sup> As Table 2 demonstrates,<sup>38</sup> the five countries were collectively dominant in the world, with 62.96% of global GDP, 139.12% of the world's average GDP per capita, 82.53% of military spend-

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34. Neil MacFarquhar, *Change Will Not Come Easily to the Security Council*, N.Y. TIMES, Nov. 8, 2010; see also Anderson, *supra* note 2, at 84 (“Whatever the justifications that existed in 1945, a Security Council today without India, for example, or any large, powerful country in Africa or Latin America as permanent members, is more than passing strange, not to mention infuriating and delegitimizing. After all, if a 1945 justification for the creation of the Council was specifically in order to keep the Great Powers within the tent, as it were—well, it is not even especially a collection of the Great Powers anymore, let alone the collection of all the Great Powers.”); Editorial, *A U.N. for the 21st Century*, N.Y. TIMES, Dec. 4, 2007 (arguing that the Security Council’s “permanent membership reflects the power relations of 1945, not 2004. The U.N. can only gain in authority and relevance by adding newly important countries from the developed and the developing world.”); Editorial, *Reapportion the Security Council*, N.Y. TIMES, June 29, 1993 (“The apportionment of seats in the Security Council—where questions of intervention are decided—is outdated. It reflects a snapshot of world power in 1945, not the reality of 1993. Without reasonable reapportionment, the legitimacy of future U.N. actions could be called into question.”).

35. McDonald & Patrick, *supra* note 2, at 9.

36. See, e.g., *id.* at vii (“[D]espite dramatic changes in the international system over the past forty-five years, the composition of the UNSC has remained unaltered since 1965, and there are many who question how long its legitimacy will last without additional members that reflect twenty-first century realities.”) (emphasis added).

37. Although power also depends on context and the intensity of interests, as discussed *infra* Part II.B, aggregate comparisons of the distribution of power across countries and over time are restricted by necessity to measurable statistics such as material resources.

38. Since Taiwan represented China's seat until 1971, statistics for both Taiwan and the People's Republic of China are provided for 1945 and 1950. While there is no reliable GDP data for China in 1945, \$200 billion is a reasonable estimate given that China's GDP was \$288 billion in 1938 and \$240 billion in 1950. See Angus Maddison, *Historical Statistics of the World Economy*, THE GRONINGEN GROWTH AND DEVELOPMENT CENTRE, [http://www.ggdcc.net/maddison/Historical\\_Statistics/horizontal\\_file\\_03-2009.xls](http://www.ggdcc.net/maddison/Historical_Statistics/horizontal_file_03-2009.xls).

ing, and 67.81% of military personnel (if one counts China rather than Taiwan).

TABLE 2. 1945 SHARES OF RESOURCES

<b>Table 2. 1945 Shares of Resources</b>	<b>GDP*</b>	<b>GDP Per Capita*</b>	<b>Military Spending**</b>	<b>Military Personnel**</b>	<b>Population*</b>
United States	39.41	580.14	63.45	23.44	6.79
United Kingdom	8.31	349.53	11.99	9.84	2.38
Soviet Union	8.00	95.15	6.06	24.17	8.41
Germany	7.24	223.30	7.51	10.25	3.24
India (1947)	6.54	32.95	0.15	0.60	19.85
China (estimated)	4.79	18.60	0.16	9.23	25.76
Japan	2.47	66.94	2.82	11.79	3.69
France	2.44	127.28	0.87	1.12	1.92
Canada	2.11	355.36	1.88	1.55	0.59
Italy	2.08	94.85	0.22	0.53	2.20
Taiwan	0.12	39.12	N/A	N/A	0.30
World (estimated)	100.00	100.00	100.00	100.00	100.00
Top 10	83.51	111.18	95.10	92.52	75.12
P-5 (with Taiwan)	58.29	294.40	82.36	58.57	19.80
<b>P-5 (with China)</b>	<b>62.96</b>	<b>139.12</b>	<b>82.53</b>	<b>67.81</b>	<b>45.26</b>

\* Angus Maddison, Historical Statistics of the World Economy, [www.ggdc.net/maddison/Historical\\_Statistics/horizontal-file\\_03-2009.xls](http://www.ggdc.net/maddison/Historical_Statistics/horizontal-file_03-2009.xls).

\*\* Correlates of War, available at <http://www.correlatesofwar.org/>.

For purposes of comparison with the contemporary world, a more accurate picture of the post-World War II global distribution of power resources is 1950, when the world demobilized to Cold War levels and war-torn depressed economies resumed peacetime levels of output. It is also the first year for which reliable statistics exist across the world. As Table 3 shows, the P-5 were still collectively strong, but at lower relative levels of potential influence compared to those of 1945, with 52.06% of global GDP, 134.69% of the world's average GDP per capita, 78.44% of military spending, and 63.08% of military personnel.

TABLE 3. 1950 SHARES OF RESOURCES

<b>Table 3. 1950 Shares of Resources</b>	<b>GDP*</b>	<b>GDP Per Capita*</b>	<b>Military Spending**</b>	<b>Military Personnel**</b>	<b>Population*</b>
United States	27.32	438.46	31.29	8.34	6.23
Soviet Union	9.57	134.58	33.34	24.56	7.11
United Kingdom	6.53	328.67	5.11	3.94	1.99
Germany	4.98	183.81	N/A	N/A	2.71
China	4.50	20.78	5.50	22.85	21.66
India	4.17	29.32	0.79	1.95	14.22
France	4.14	249.67	3.20	3.40	1.66
Italy	3.10	165.86	1.21	1.34	1.87
Japan (1952)	3.02	90.97	0.62	0.68	3.32
Canada	0.26	345.36	0.96	0.26	0.56
Brazil	1.68	79.18	0.72	1.32	2.12
Taiwan	0.14	43.78	0.17	1.71	0.32
World*	100.00	100.00	100.00	100.00	100.00
Top 10	67.58	112.91	82.02	67.30	61.32
P-5 (with Taiwan)	47.69	275.64	73.11	41.94	17.30
<b>P-5 (with China)</b>	<b>52.06</b>	<b>134.69</b>	<b>78.44</b>	<b>63.08</b>	<b>38.65</b>

\* Angus Maddison, Historical Statistics of the World Economy, [www.ggdc.net/maddison/Historical\\_Statistics/horizontal-file\\_03-2009.xls](http://www.ggdc.net/maddison/Historical_Statistics/horizontal-file_03-2009.xls).

\*\* Correlates of War, available at <http://www.correlatesofwar.org/>.

In 2010, as depicted in Table 4, the respective levels of the P-5 were lower, but not dramatically so, with a ten percent decrease in the share of global GDP and a seventeen percent decrease in the share of military spending (and only five percent and twelve percent decreases, respectively, if one includes Taiwan in the P-5 in 1950).

TABLE 4. 2010 SHARES OF RESOURCES

Table 4. 2010 Shares of Resources	GDP*	GDP Per Capita*	Military Spending***	Military Personnel**	Population*
United States	23.31	512.63	42.82	7.62	4.55
China	9.35	47.51	7.30	11.41	19.67
Japan	8.68	464.24	3.34	1.21	1.87
Germany	5.27	440.51	2.77	1.25	1.20
France	4.11	444.71	3.64	1.29	0.92
United Kingdom	3.57	391.60	3.66	0.97	0.91
Brazil	3.32	117.27	2.06	1.46	2.83
Italy	3.27	369.25	2.27	0.97	0.89
India	2.45	13.71	2.53	6.66	17.83
Russia	2.33	113.16	3.60	5.20	2.06
World	100.00	100.00	100.00	100.00	100.00
Top 10	65.66	124.50	73.99	38.04	52.74
P-5 + G-4	62.39	120.32	71.72	37.07	51.85
P-5 + India & Japan	53.79	112.49	66.90	34.37	47.82
<b>P-5</b>	<b>42.67</b>	<b>151.75</b>	<b>61.02</b>	<b>26.49</b>	<b>28.12</b>

\* IMF, World Economic Outlook Database, available at <http://www.imf.org/external/pubs/ft/weo/2011/01/weodata/index.aspx>.

\*\* Correlates of War (2007 data), available at <http://www.correlatesofwar.org/>.

\*\*\* Stockholm International Peace Research Institute, available at [http://www.sipri.org/research/armaments/milex/resultoutput/milex\\_1](http://www.sipri.org/research/armaments/milex/resultoutput/milex_1).

Moreover, GDP per capita of the permanent five—which reflects countries' potential ability to use their disposable income abroad after accounting for domestic consumption and investment—actually increased relative to the global average by seventeen percent. More importantly, it is somewhat artificial to construe the collective power of the P-5 in 1950 through a simple addition of their respective shares. With greater cooperation among the P-5 in 2010 compared to 1950, the Security Council's collective power may actually be greater now than at the founding. This interpretation is supported by the much higher levels of Council activity in the post-Cold War era compared to the post-World War II years.

Even if one tried to match the 1950 levels of the Security Council's collective share of resources, this objective could be achieved by fine-tuning the system with a minimalist model of enlargement by including India and Japan among the permanent members. Interestingly—and contrary to conventional wisdom—India's rise since 1950 has been in military terms (from 1.95% of global military personnel to 6.66%), whereas it has experienced a relative decline economically (from 4.17% of global GDP to 2.45%). If the other two countries of the G-4 (Brazil and Germany) were included, the P-9 would then actually exceed the 1950 P-5 level of economic influence by ten percent and nearly equal the level of military spending (if one counts Taiwan in 1950).

As will be demonstrated further below in Part II, there are several problems with this equation between material resources and power. However, the existing literature has not fully made these calculations. For instance, McDonald and Patrick's incisive study listed the top ten countries ranked by GDP for 1945 and 2008 and by defense spending for 1955 and 2008 through 2009;<sup>39</sup> it did not, however, provide relative shares of global resources in the two categories—which are much more indicative of power than absolute amounts—nor data on GDP per capita, military personnel, or population.

Other scholars have focused solely on military spending at the exclusion of other power resources for purposes of assessing the Security Council's relevance and legitimacy. Michael Glennon proclaimed the demise of the Security Council's role in maintaining international peace and security in the aftermath of the 2003 Iraq war, attributable in part to American hegemony and the unipolarity of the international system. He argued that “[t]hese realities [of hegemony and unipolarity] provide little reason to believe that the Security Council will soon be resuscitated to tackle nerve-center security issues, whatever the aftermath of the Second Gulf War.”<sup>40</sup> Yet, as evidenced in Table 1 above, the Council continued its post-Cold War trend of activity notwithstanding this moment of crisis. One reason may have been the fact that, while the world may be unipolar in terms of military spending and capability, it is multipolar economically and even in terms of military personnel. For instance, the European Union had 25.89% of global GDP in 2010, or slightly larger than the U.S. economy.<sup>41</sup> And China exceeds the United States in number of soldiers, with India and Russia not far behind (11.41%, 7.62%, 6.66%, and 5.20%, respectively).<sup>42</sup> Even more importantly, there often is not a one-to-one relation between material resources and the power to achieve preferred objectives, as evidenced starkly in Iraq. Michael Reisman pointed out that:

The enormous American military power translates into what has been aptly called “fate control” but not “behavior control”—the United States has the ability to obliterate an adversary, as a theoretical if not a practical matter, but it effectively lacks the ability to control the adversary's behavior. It is certain that the United States could completely destroy Iraq in a few hours. It is not cer-

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39. McDonald & Patrick, *supra* note 2, at 32–33.

40. Glennon, *supra* note 2, at 110.

41. The EU tends to speak with one voice economically, especially in matters of international trade, and to a large extent in monetary policy (with the European Central Bank setting interest rates for the sixteen countries of the Eurozone, which reflects seventy-five percent of the EU's GDP), and increasingly so in general fiscal policy. See generally GIANDOMENICO MAJONE, EUROPE AS THE WOULD-BE WORLD POWER (2009); INTERNATIONAL MONETARY FUND, WORLD ECONOMIC OUTLOOK DATABASE, <http://www.imf.org/external/pubs/ft/weo/2011/02/weodata/index.aspx>.

42. See *supra* Table 4.

tain that it could, at a nationally or internationally acceptable price, control Iraq's behavior.<sup>43</sup>

Thus, whatever the normative attractiveness or unattractiveness of the realist perspective, its proponents fail to follow their own edicts and be "hard-headed" about their claims regarding power.<sup>44</sup>

Realist scholars who acknowledge multipolarity in world politics have portended a dismal future for the Security Council. For example, Kenneth Anderson argued that the "possibility of even modest liberal international global governance in security matters was at its zenith under the American security guarantee, and is much less likely in a competitive multipolar world."<sup>45</sup> He claimed, without empirical data in support of his thesis, that multipolarity implies for the Council the function of the "talking shop of the nations" and only rhetorically and on special (undefined) occasions as the "management committee of collective security."<sup>46</sup> Assuming—again without empirical support—that competitive interests would prevail in the Security Council in the future, Anderson argued that multipolarity will *ipso facto* lead to greater conflict.<sup>47</sup> However, like power and legitimacy, interests are not necessarily self-evident, and it is unclear why the preponderance of interests within the Security Council should be automatically clashing rather than potentially harmonious through clarification and agreement.<sup>48</sup>

In sum, the Council's perceived problem does not arise from insufficient resources, at least in comparison to the equilibrium levels at its founding. Yet the Council has still proved unable to fulfill its obligation under the Charter to maintain international peace and security in too many cases, such as Bosnia, Rwanda, Kosovo, and Darfur. Thus, the deficiency of its power must lie elsewhere than a lack of material resources.

The alternative approach to reforming the Council has aimed to constrain its seemingly unbounded power by enhancing its legitimacy based on models of democracy or procedural fairness. The following section addresses this approach.

### C. *Misdiagnoses of the Council's Legitimacy*

Analogizing from the model of the nation-state, where "[t]he democratic idea is close to nonnegotiable in today's world,"<sup>49</sup> some critics have argued that the Security Council lacks legitimacy due to its democratic deficit. The Council's permanent members have never represented a majority of the

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43. W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516, 522 (2004).

44. Glennon, *supra* note 2, at 112.

45. Anderson, *supra* note 2, at 59.

46. *Id.* at 83.

47. *Id.*

48. See *infra* Part III.A.

49. IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 1 (2003).

world's population,<sup>50</sup> nor have its members been chosen in free and fair global elections; on the other hand, if the Council were to include India as one of the non-permanent members, it could collectively represent more than fifty percent of the global population.<sup>51</sup> The General Assembly membership, while also not chosen in free and fair global elections, does represent nearly the entire world. Its resolutions, however—even when enacted on designated important issues by the required two-thirds of the 193 members—can reflect a small minority of only 11.85% of the global population.<sup>52</sup> In any case, the Assembly has no binding power over the Council, moreover, nor is it consulted by the Council. This state of affairs has given rise to various suggestions to address the Council's lack of a democratic basis.

For instance, consider Steven Wheatley's assessment of the legitimacy of three Security Council resolutions: Resolution 1483 (2003) (establishing the legal basis for the occupation of Iraq); 1511 (2003) (inviting the Iraqi Governing Council to provide for the drafting of a new constitution and holding of democratic elections); and 1546 (2004) (endorsing the interim and transitional constitutional arrangements introduced by the Transitional Administrative Law).<sup>53</sup> Applying a standard of democratic legitimacy, Wheatley argued that Security Council resolutions have democratic legitimacy if "they are consistent with the constitutional framework provided by the U.N. Charter and wider international law, and . . . accord with the practice of the Security Council in 'like' cases, or the Council is able to demonstrate sufficient justification for the exercise of political authority in the particular case."<sup>54</sup> He concluded that the three resolutions on Iraq violated "the right of the Iraqi people to political self-determination, creating a conflict between the Security Council resolutions adopted under Chapter VII and an international norm of *jus cogens* standing [the principle of self-determination]" and suggested a "model of constitutional adjudication in cases of conflict between these 'higher' forms of obligation."<sup>55</sup>

Wheatley acknowledged that all three resolutions were adopted unanimously by the Security Council (with only Syria abstaining). He also stated that "[t]here is no doubt that the situation in Iraq fell squarely within the scope of authority of the Security Council;" that "the decisions enjoyed a high degree of procedural legitimacy in the form of participatory deliberations in the Security Council;" and that "the resolutions endorsing demo-

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50. The P-5 accounted for 38.65% and 28.12% of the world's population in 1950 and 2010, respectively. *Supra* Tables 3–4.

51. I am grateful to Sean Murphy for pointing out this distinction.

52. Given 193 members in the Assembly, resolutions requiring two-thirds majority require 129 votes. The 129 United Nations members with the smallest populations collectively had 807.68 million people in 2010, or 11.85% of the 6.818 billion total. See *WORLD ECONOMIC OUTLOOK*, *supra* note 41.

53. Wheatley, *supra* note 2.

54. *Id.* at 532.

55. *Id.* at 533.

cratic regime change are consistent with the practice of the Security Council.”<sup>56</sup> However, he argued that Resolution 1546—which endorsed the establishment of a multi-ethnic power-sharing government in a “federal, democratic, pluralist, and unified Iraq”—moved toward “a highly devolved federal system with limited evidence of support from the Iraqi people, in contravention of their right to political self-determination.”<sup>57</sup> Moreover, he claimed that the resolution failed to provide any justification for its decision and thus failed according to the “principle of public reason.”<sup>58</sup> Therefore, Wheatley concluded that the Security Council’s recognition of the particular form of federal democratic government implemented in Iraq was illegitimate.

While it is incontestable that the principle of self-determination is enshrined in international law, this analysis of Security Council resolutions reflects potential pitfalls associated with applying democratic standards to the Council. First, Wheatley assumes that “democratic legitimacy” is equivalent to consistency with Security Council practice, the U.N. Charter, and international law. While these criteria could be the basis for legitimacy analysis, they are not equivalent to democracy. Clearly, members of the Security Council are not elected in global elections with majority rule as the decisionmaking principle, and the U.N. Charter is not subject to popular amendment. Second, the constitutional structure approved by the resolutions enjoyed general popular support from the Iraqi population. Wheatley recognizes that “the people of Iraq voted by a majority of [seventy-nine percent to twenty-one percent] to approve the new constitution.”<sup>59</sup> While Wheatley focuses on the opposition of the Sunnis to the new political structure—unsurprising given their privileged position under the Saddam Hussein regime (and partly similar to the opposition of Bosnian Serbs in Bosnia)—it is unclear why their views should trump the preferences of nearly eighty percent of the country. In any event, there is never universal consensus on most issues within any country, as dissent is inherent to democracy. On the other hand, Wheatley’s proposed solution—whereby the Security Council would provide more extensive justification within its resolutions—has potential merit, as discussed further below.

Focusing on the deliberative deficit in the Council as the source of its legitimacy problem, Ian Johnstone argued that “improving the quality of deliberations would enhance the legitimacy and, therefore, effectiveness of Council decisionmaking.”<sup>60</sup> He claimed that the Council’s traditional crisis management role to maintain international peace and security through

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56. *Id.* at 548.

57. *Id.* at 549.

58. *Id.*

59. *Id.* at 537.

60. Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT’L L. 275, 275 (2008); see also Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT’L L. 437 (2003).



prompt and effective action “militates against extensive deliberation.”<sup>61</sup> However, for purposes of legitimating its quasi-legislative and quasi-judicial functions associated with, for instance, criminalizing terrorist financing and freezing assets of suspected terrorists, Johnstone stated that reasoned argumentation can increase the chances of agreement and lessen resistance in case of disagreement. To facilitate greater reasoned deliberation in these sets of cases, he recommended three measures: inclusive consultations with the General Assembly; public justification to increase transparency and accountability; and independent review of Council decisions by an internal panel or ombudsman within the Secretariat.<sup>62</sup>

Based on a review of the implementation of Resolution 1373 (suppressing terrorist finance), Resolution 1540 (preventing proliferation of weapons of mass destruction to terrorist groups), and Resolution 1267 (targeted sanctions against the Taliban and Al-Qaeda), Johnstone argued that there was a direct correlation and causality between the descending level of deliberation from the first to the third and the decreasing level of legitimacy and effectiveness. Though “[l]ittle negotiation accompanied the adoption of Resolution 1373,” its implementation was conducted through a transparent process that was open to states outside of the Security Council.<sup>63</sup> In contrast, Johnstone stated, Resolution 1267 authorized sanctions against individuals associated with the Taliban or Al-Qaeda—but it was inconsistent with deliberative principles by failing to provide for independent review, public notice of the sanctions, or reasons for listing and delisting individuals. On the other hand, any state could object to an individual being put on the sanctions list within five days of proposal or to remove a name from the list afterward.<sup>64</sup>

As Johnstone predicted, the effectiveness and legitimacy of the Resolution 1267 sanctions regime have been undermined due to its procedural deficiencies. For example, the European Court of Justice has held that EU governments cannot implement this program because it violates EU fundamental rights.<sup>65</sup> Similarly, at least fifty states have raised concerns regarding this system, further undermining its support.<sup>66</sup> Notably, this analysis highlights the importance of the power of persuasion, in addition to economic and military resources, to the legitimacy and effectiveness of the Security Council.<sup>67</sup> But deliberation and persuasion can be just as important during crisis management situations as with general legislation—a possibility Johnstone discounted too readily.

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61. Johnstone, *Legislation and Adjudication*, *supra* note 60, at 276.

62. *Id.*

63. *Id.* at 286–88.

64. *Id.* at 294–97.

65. See *Kadi v. Council of the E.U.*, 2005 E.C.R. II-3649; *Yusuf & Al Barakaat*, 2005 E.C.R. II-3533.

66. Johnstone, *Legislation and Adjudication*, *supra* note 60, at 297.

67. See *id.* at 308 (Increased deliberation “will not eliminate the significance of material power and coercion, of course . . .”).

Notwithstanding attempts to apply democratic standards of legitimacy to constrain the Council's allegedly unbounded power, these accounts are as incomplete as the assessments that propose increasing the Council's purportedly deficient power. Indeed, the optimal reform according to the logic of democratic legitimacy would be disbanding the Council altogether and allocating its jurisdiction to the U.N. General Assembly—or even further, requiring global elections for either body with proportional representation—yet few advocate such drastic changes. The lack of such comprehensive proposals suggests that democratic legitimacy is not the appropriate framework to apply to the Council.

#### D. *Theoretical Limitations of Existing Reforms*

Reform proposals based purely on power are unsatisfactory, since they fail to respond to the legitimacy critique of the Security Council, and democracy and procedural fairness are not appropriate legitimacy criteria for Council reform. The sufficiency of legitimacy as legality is addressed in Part II.A, but, as a threshold matter, why does the question of legitimacy matter at all?

*First*, there is a risk of resistance to a political order or decision deemed illegitimate. A decisionmaker (e.g., the Security Council) simply announcing a decision does not imply that it will be accepted by the *decision-receiver* (e.g., the state or non-state actor that is the subject of the resolution). Decisions and orders considered illegitimate are resisted and occasionally overturned. As one U.S. constitutional law scholar has noted, “[t]o condemn something as illegitimate” is “implicitly to threaten defiance. It is to suggest that the government should, in some respect, not be obeyed.”<sup>68</sup> In contrast, decisions that are questioned, debated, but eventually accepted further consolidate their own legitimacy and that of the underlying order.

*Second*, legitimacy is necessary from the perspective of the political decisionmaker to promote the confidence and sense of purpose needed to sustain a decision over time. Overcoming both external and internal friction is integral to the effectiveness of decision.<sup>69</sup> As Paul Kahn observed, “[c]oercion [due to external friction] requires too many social resources to sustain indefinitely, while cognitive dissonance [due to internal friction] requires too many psychic resources.”<sup>70</sup> And even Henry Kissinger, the dean of realism, has conceded that power requires values because otherwise it becomes “arbitrary and unmanageable.”<sup>71</sup>

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68. David A. Strauss, *Reply: Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1854 (2005).

69. On the concept of friction, see generally CARL VON CLAUSEWITZ, *ON WAR* (Michael Howard & Peter Paret eds. and trans., 1993).

70. See, e.g., PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 93 (2011).

71. Kissinger, *supra* note 1.

While the deliberative model outlined by Johnstone may be appropriate for Security Council legislation (even if it does not provide a complete framework for assessing the Council's legitimacy in all of its functions), it is less clear why democratic legitimacy should be the standard applicable to the Council or, for that matter, to other international or supranational organizations.<sup>72</sup> Indeed, there are strong reasons against mechanically transplanting legitimacy standards based on nation-states to international institutions such as the Security Council. For instance, Robert Keohane and Allen Buchanan argue that global democracy is not a plausible source of legitimacy for global institutions because there are insufficient "social and political conditions for democracy," such as a global community "habitually communicating with one another about public issues."<sup>73</sup> They view global democracy as simply impossible in any foreseeable future and thus as not a plausible source of legitimacy.<sup>74</sup>

Consider why democracy has become the prevalent source of legitimacy in contemporary nation-states. Democratization within countries (either by introducing elections or expanding the franchise base) has generally occurred concurrently with greater empowerment of a larger number of people than under the prior regime. Such enhancement of power (the ability to participate in real decisionmaking) of the previously powerless can take place through changes in the distribution of wealth, broadening of knowledge and education, lowered communication and organizational costs through technological advancement, or most immediately and dramatically, the prior regime's need for additional manpower in times of war.<sup>75</sup>

For instance, democratic citizenship in Western Europe during the nineteenth and twentieth centuries "was the product of the interrelated processes of state building, the emergence of commercial and industrial society, and the construction of a national consciousness, with all three driven forward in

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72. For example, the confusion of representativeness with legitimacy is also characteristic of debates surrounding the EU's legitimacy. Theoretical frameworks based on hierarchical nation-states are commonly misapplied to decentralized communities. See JOSEPH H.H. WEILER, *THE CONSTITUTION OF EUROPE* 79 (1999) ("The absence of a critical approach derives in part from a loose usage of the notions of democracy and legitimacy. Very frequently in discourse about the Parliament and the Community the concepts of democracy and legitimacy have been presented interchangeably although in fact they do not necessarily coincide.").

73. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *ETHICS & INT'L AFF.* 405, 416–17 (2006).

74. See *id.* ("[O]nce it is understood that it is *liberal* democracy, democracy that protects individual and minority rights, that is desirable, the Global Democracy View seems even more unfeasible.") (emphasis in original).

75. See, e.g., RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* 205 (2007) ("It is no accident that the most progressive periods of social reform in modern times have coincided with mass mobilisation for war, when rulers had to convince citizens of the value of fighting for their country. In many countries, war also stimulated the extension of the franchise to workers and especially to women, who now became an acknowledged part of the domestic labour force.").

various ways by war.”<sup>76</sup> Each of these processes “provided certain preconditions of democratic citizenship” such that their “net effect . . . was to create a ‘people’” who were entitled to equality before the law as citizens, possessed national solidarity, and shared loyalty toward the state.<sup>77</sup>

A similar process took place in the United States, where the extension of the right to vote to African-Americans in 1870 was expected by African-Americans based on their participation in the mass mobilization in the Union Army during the Civil War. Consider in this regard the insightful observation of Frederick Douglass, one of the foremost leaders of the abolitionist movement:

I think you will see to it that we have the right to vote. There is something too mean in looking upon the negro, when you are in trouble, as a citizen, and when you are free from trouble, as an alien. When this nation was in trouble, in its early struggles, it looked upon the negro as a citizen. In 1776 he was a citizen. At the time of the formation of the Constitution the negro had the right to vote in eleven States out of the old thirteen. In your trouble you have made us citizens. In 1812 General Jackson addressed us as citizens—“fellow-citizens.” He wanted us to fight. We were citizens then! And now, when you come to frame a conscription bill, the negro is a citizen again. He has been a citizen just three times in the history of this government, and it has always been in time of trouble. In time of trouble we are citizens. Shall we be citizens in war, and aliens in peace?<sup>78</sup>

Women similarly secured the right to vote in 1920, partially as a result of their participation in the labor force that proved indispensable to the war effort in World War I.<sup>79</sup> Finally, the lowering of the voting age to eighteen years with the Twenty-Sixth Amendment in 1971 was inextricably linked with the sacrifices of American youth during the Vietnam War.<sup>80</sup> In each case, democratization followed and reflected rather than preceded an underlying transformation in the distribution of resources and power within the populace.

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76. Richard Bellamy, Dario Castiglione & Jo Shaw, *Introduction: From National to Transnational Citizenship*, in *MAKING EUROPEAN CITIZENS: CIVIC INCLUSION IN A TRANSNATIONAL CONTEXT* 4 (Richard Bellamy, Dario Castiglione & Jo Shaw eds., 2006).

77. *Id.*; see also *LINEAGES OF EUROPEAN CITIZENSHIP: RIGHTS, BELONGING AND PARTICIPATION IN ELEVEN NATION-STATES* (Richard Bellamy, Dario Castiglione & Emilio Santoro eds., 2004).

78. Frederick Douglass, *Address at the Annual Meeting of the Massachusetts Anti-Slavery Society: What the Black Man Wants* (Apr. 1865), in *SELECTED ADDRESSES OF FREDERICK DOUGLASS* 24, 29 (Wilder Publ'ns ed., 2008).

79. Holly J. McCammon et al., *How Movements Win: Gendered Opportunity Structures and U.S. Women's Suffrage Movements, 1866 to 1919*, 66 *AM. SOC. REV.* 49, 55 (2001).

80. Elizabeth Aloi, *Thirty-five Years after the 26th Amendment and Still Disenfranchised: Current Controversies in Student Voting*, 18 *NAT. BLACK L.J.* 283, 285 (2005).

From this perspective democracy, rather than being an unassailable, universally applicable normative source of legitimacy, legitimates popular sovereignty within a state or any political community once a people establishes and consolidates such power. Consider the following two examples in military and economic affairs. During the nineteenth century, officers in the U.S. Army were elected by their soldiers<sup>81</sup> before more regimented structures were introduced with appointed officers. Similarly, interest rates were deemed once within the legitimate authority of national governments, but currently this authority has been transferred uniformly to independent and unelected central banks. The main point of these examples is that democratic decisionmaking is legitimate under particular conditions but not others: say, selecting officers when individuals raised and sometimes funded their own battalions to provide for the U.S. Army, but not when there is a standing volunteer army with an available corps of professional officers.

One could argue that democracy is (empirically rather than normatively) legitimate within a particular political order only to the extent it reflects a conducive power distribution within that order.<sup>82</sup> For instance, Solon, after drafting the constitutional foundations for democracy in ancient Athens, stated that it was the “best they *could receive*.”<sup>83</sup> Similarly, when asked what political system was created at the Philadelphia Constitutional Convention in 1787, Benjamin Franklin responded: “A Republic, if you *can keep it*.”<sup>84</sup> In other words, democracy is sustainable only given favorable underlying allocation of resources and influence. Otherwise, popular elections can be held and political representatives selected, as for example in the Soviet Union or other communist countries, but their outcomes are disregarded and deemed illegitimate, since power is held and decisions are made elsewhere. The mayor, even if elected, is not always the boss,<sup>85</sup> and this reality cannot be overcome merely through procedural changes such as introducing elections.

In this vein, Adam Przeworski has argued that there is an inherent link between democracy and the internal distribution of power in a society. He observes that “[v]oting constitutes ‘flexing muscles’: a reading of chances in the eventual war” assuming that “[i]f all men are equally strong (or armed) then the distribution of vote is a proxy for the outcome of war.”<sup>86</sup> While

81. See DAVID McCULLOUGH, *TRUMAN* (1993).

82. See Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 *AM. POL. SCI. REV.* 69 (1959).

83. PLUTARCH, 1 *PLUTARCH'S LIVES* 130 (Arthur H. Clough ed., John Dryden trans., 1970) (emphasis added).

84. JAMES MCHENRY, *PAPERS OF DR. JAMES MCHENRY ON THE FEDERAL CONVENTION OF 1787* (1787), available at [http://avalon.law.yale.edu/18th\\_century/mchenry.asp](http://avalon.law.yale.edu/18th_century/mchenry.asp) (emphasis added).

85. See W. Michael Reisman, *Book Review*, 29 *AM. J. COMP. L.* 727, 727–28 (1981) (reviewing ROGLIO PÉREZ PERDOMO, *EL FORMALISMO JURIDICO Y SUS FUNCIONES SOCIALES EN EL SIGLO XIX VENEZOLANO* (1978)) (describing the political order in nineteenth-century Venezuela as being ruled by “a strong man or Boss to whom subordinates owe personal rather than formal authority.”).

86. Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in *DEMOCRACY'S VALUE* 48 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999). He also notes that “the mere possibility of being able to change governments can avoid violence.” Though the losers in any given election may be “better off in

individual brute physical strength plays a minor role in the distribution of coercive force in modern societies with professionalized and technologically-advanced military and police (let alone power, which encompasses instruments of both pain *and* pleasure, coercion and suasion), Przeworski's insight is unassailable. The inherent relationship between the underlying social base and its operational political structure is one reason why democracy is difficult to impose absent of total victory—as was the case of Germany and Japan after World War II—where the military victor can reshape the distribution of resources and power in a society to provide for the underpinnings of democracy.<sup>87</sup>

Absent a similar rearrangement of resources in the world, the Security Council faces an insurmountable obstacle to establishing its democratic legitimacy. Popular elections for the Council would be deemed illegitimate as long as the current highly-unequal power distribution in the world is maintained. Decisions enacted by a democratic Security Council would be simply disregarded by power centers in Beijing, Brussels, or Washington if unfavorable to them. A democratic Security Council without the power to enforce its decisions in other policy areas would quickly reveal its claims to democratic legitimacy to be mere pretense and irrelevant to any actual decision-making. With no ability to enforce its authority, a democratic Security Council would gradually become discredited and inconsequential: a forum for discussion but not for decision. For the time being, the power distribution within the world is not conducive to democratic decisionmaking. But if global democracy cannot be the orienting principle for the Council, then what should be?

Both sets of critiques outlined in Part I.A are partially right insofar as the Council has insufficient power in some cases and seemingly unbounded (and thereby inherently illegitimate) power in other cases. But the conventional reform proposal based on expanding membership is flawed, because it has given insufficient attention to the underlying purpose of the Council by which its power is constrained *and* justified.

Recall the crises during which the Security Council has been perceived to have failed in its duty under the U.N. Charter to maintain international peace and security: Bosnia in 1992, Rwanda in 1994, Darfur in 2003<sup>88</sup>, or

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the short run rebelling rather than accepting the outcome of the current round, if they have a sufficient chance to win and a sufficiently large payoff in the future rounds, they are better off continuing to comply with the verdict . . . rather than fighting for power." *Id.* at 45–46. However, this incentive to avoid violence and play within the rules exists whether the uncertainty regarding the future holders of power is generated based on votes or, in Przeworski's example, by a coin toss.

87. See generally JAMES DOBBINS ET AL., *AMERICA'S ROLE IN NATION-BUILDING. FROM GERMANY TO IRAQ* (2003).

88. See JOHN F. MURPHY, *THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW: HARD CHOICES FOR THE WORLD COMMUNITY* 135 (2010) (arguing that the failure to prevent atrocities "would seem to mock the affirmation by the U.N. General Assembly and the Security Council of the so-called responsibility to protect").

was ignored by other actors, as in Kosovo in 1999<sup>89</sup> or Iraq in 2003.<sup>90</sup> In each of these situations, the main problem was not the lack of collective capabilities (military, economic, or diplomatic) of the P-5 and the wider Security Council, but the insufficient intensity of perceived common interests at stake. Even when the Council did act successfully—as in Kuwait in 1990, Bosnia in 1994, East Timor in 1999, Afghanistan in 2001, and Libya in 2011—it was never with a “genuinely collective assertion of authority and control dedicated to the restoration of international peace and security,”<sup>91</sup> but rather based on select participation of actors, with varying degrees of involvement across the interventions, whose interests were at stake and who had the requisite resources in the particular context.<sup>92</sup> Therefore, the primary question for the Security Council is what common values, purposes, or interests its power should serve. Only then can one address whether it has sufficient or inadequate power, and how such power should be exercised.

Having properly reformulated the problem, Part II turns to ways of construing the Council’s purpose.

## II. INTERPRETING THE SECURITY COUNCIL’S PURPOSE

If the lack of clarity as to the Council’s purpose is its main problem, how should its purpose be identified? As noted in Part I, there is consensus within the international community that the Council’s purpose should continue to be the maintenance of international peace and security under Article 24 of the U.N. Charter. This sense of obligation has been fully internalized by international actors.<sup>93</sup> However, controversy has arisen due to a lack of clarity regarding the meaning of this obligation in specific situations. In particular, demands on the Council from the perspective of democratic legitimacy have broadened the interpretation of the international peace and security that is worth maintaining in favor of intervention on behalf of democratic values and human rights, as discussed further in Part III. On the other hand, there have been no demands to expand the Council’s purpose to other policy areas such as management of the world economy or climate change, though each could be conceived as an issue of international peace and security since economic and environmental issues are sometimes depicted as national security issues within countries. Therefore, the debate is

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89. See *infra* Part III.A.

90. See Slaughter, *supra* note 16.

91. Weston, *supra* note 23, at 518.

92. See *infra* Part III.A for a detailed discussion of the Council’s responses (or lack thereof) to crises in Bosnia, Kosovo, and Libya.

93. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603 (1997) (describing the pathways through which international law “penetrates into a domestic legal system, thus becoming part of that nation’s internal value set”).

bounded, has a focal point in interpreting Article 24, and is thus a prime subject for legal analysis.

A. *Text, Context, and Practice of Article 24*

Article 24 of the U.N. Charter provides for the power and purpose of the Security Council:

1. 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.
2. 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.
3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Since the Charter is a treaty, it can be construed according to the conventional rules of interpretation provided by the Vienna Convention on the Law of Treaties (hereinafter “VCLT” or “Vienna Convention”).<sup>94</sup>

Article 31(1) of VCLT provides that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>95</sup> Article 31(2), in turn, provides that the “context” includes, among other things, a treaty’s preamble.<sup>96</sup> Thus, the ordinary meaning of Article 24 of the Charter, given the open-textured nature of “international peace and security,” needs to be construed from the perspective of the Charter’s broader purposes.

The Charter—signed in 1945 in the shadow of the devastation of World War II and amended three times but only with respect to membership rather than its substantive purposes<sup>97</sup>—prioritized minimization of violent conflict among the great powers over other values. The world embraced peace and security as its primary values, to which all others such as human rights, justice, and liberty would be subservient.

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94. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

95. *Id.* art. 31(1).

96. *Id.* art. 31(2).

97. Thomas G. Weiss, *The Illusion of UN Security Council Reform*, 26 WASH. Q. 147, 147–48 (2003) (“[O]nly three amendments have been made to the UN Charter in almost 60 years—and all dealing only with seat numbers in two of the six principal organs, once for the Security Council and twice for the United Nations Economic and Social Council.”).



The Charter's Preamble acknowledged values of "fundamental human rights," "dignity and worth of the human person," "equal rights of men and women and of nations large and small," "justice," "social progress," and "better standards of life in larger freedom."<sup>98</sup> However, its Purposes articulated in Article 1 consisted primarily of security values, such as "maintain[ing] international peace and security," "develop[ing] friendly relations among nations," and "harmonizing the actions of nations in the attainment of these common ends."<sup>99</sup> During the Cold War, there were a few interventions on behalf of human rights values, e.g., in Southern Rhodesia<sup>100</sup> and Namibia,<sup>101</sup> such that one could interpret the Charter as giving equal weight to security and liberty.<sup>102</sup> However, this practice was limited and overshadowed by numerous cases in which human rights violations occurred with impunity.<sup>103</sup> While both categories of values were proclaimed as purposes of the international community, liberty interests historically tended to be circumscribed by security interests.

Thus, the operational principles underlying the U.N. system expressed in Article 2 consisted exclusively of security-enhancing liberty values such as sovereign equality, territorial integrity, political independence, and non-interference in internal affairs. States were ordered under Article 2(4) "to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."<sup>104</sup> Similarly, Article 2(7) reassured would-be human rights violators and illiberal and unjust governments that the United Nations would not intervene in their internal affairs, except for the Security Council's power to take binding measures under Chapter VII to maintain international peace and security.<sup>105</sup>

There were only two exceptions to this global prohibition on the use of force. Under Article 42, the U.N. Security Council could authorize such use of force, "as may be necessary to maintain or restore international peace and

98. U.N. Charter pmbl.

99. U.N. Charter art. 1.

100. S.C. Res. 216, U.N. Doc. S/RES/216 (Nov. 12, 1965) (condemning "the unilateral declaration of independence made by a racist minority in Southern Rhodesia" and calling "upon all States not to recognize this illegal racist minority regime in Southern Rhodesia.").

101. S.C. Res. 276, U.N. Doc. S/RES/276 (Jan. 30, 1970) (reaffirming that the expansion of the South African apartheid regime into Namibia "constitute[s] illegal acts and flagrant violations of the rights of the Namibians concerned, the Universal Declaration of Human Rights and the international status of the Territory."); *see also* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16.

102. I am grateful to Dinah Shelton for pointing out this issue.

103. *See* THE UNITED NATIONS SECURITY COUNCIL AND WAR, *supra* note 2.

104. U.N. Charter art. 2, para. 4.

105. The full text of Article 2(7) provides: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." *Id.* art. 2, para. 7.

security.”<sup>106</sup> Unilateral use of force by states was limited under Article 51 to the “inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>107</sup> If the right of self-defense was to be taken to its logical conclusion, the U.N. system made the choice of zero wars, or at least provided pressure towards that equilibrium, since no state could initiate war for any reasons other than repelling another state’s armed attack, and the Council could intervene only to reinstate the status quo international peace and security among states.

Through these provisions, the Charter made peace and security supreme over any considerations of human rights and justice. Given the primary objective of preventing future violent conflict among the great powers, the permanent members of the Security Council were granted veto power over substantive decisions to preclude any force being authorized against them or their interests around the world (including those of their allies).<sup>108</sup>

The international political system is not static, however, and neither is its law. Indeed, Article 31(3) of VCLT provides three additional methods of interpreting the context of a treaty:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; [and]
- (c) any relevant rules of international law applicable in the relations between the parties.<sup>109</sup>

Unfortunately, there is no subsequent agreement regarding the interpretation of the Council’s primary responsibility for the maintenance of international peace and security. As noted in Part I, the Council’s subsequent practice in this area has not been uniform and thus does not evidence agreement regarding interpretation.

With respect to other “relevant rules of international law” under Article 31(3)(c), all of the permanent members of the Security Council, in addition to 136 other ratifying states, are obliged to prevent and to punish genocide under the Genocide Convention.<sup>110</sup> While the Convention itself does not authorize the use of force, the Security Council with power under the Charter to use force could interpret international peace and security as preventing

106. *Id.* art. 42.

107. *Id.* art. 51.

108. *Id.* art. 27.

109. VCLT, *supra* note 94, art. 31(3).

110. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

and punishing genocide and similar acts such as extermination as a crime against humanity. The same logic would apply to other universal obligations, such as the prohibition against torture. Ultimately, however, it is unclear how these obligations on individual member states translate into obligations for the Security Council within its responsibility for maintenance of international peace and security.

The Vienna Convention, under Article 32, also provides for additional interpretive methods when the meaning of a treaty text is “ambiguous or obscure” or leads to a “manifestly absurd or unreasonable” result. It states that “[r]ecourse *may* be had to supplementary means of interpretation, *including* the preparatory work of the treaty and the circumstances of its conclusion.”<sup>111</sup> However, these means are optional and not exclusive to other supplementary means of interpretation.

Thus, some progress can be made in interpreting the Council’s responsibility through conventional legal analysis of the Charter, but there remains significant uncertainty. Legality, like democracy and procedural fairness, proves to be an insufficient guidepost to enhancing the Council’s legitimacy.

### B. *Uncertainty of Law and Power in Complex Orders*

The above analysis of the Charter and Article 24 illustrates the inherent uncertainty of international law and the lack of determinative answers to the issue of the Council’s purpose (and, in turn, what power and membership it should have). This epistemological constraint is typical of any complex and changing political order. For instance, former U.S. Supreme Court Justice David Souter discussed the unavoidable ambiguity of constitutional law, notwithstanding human desire for simplicity and certainty:

[S]omething deeper is involved, and that behind most dreams of a simpler Constitution there lies a basic human hunger for the certainty and control that the fair reading model [based on the plain text of the Constitution] seems to promise. And who has not felt that same hunger? Is there any one of us who has not lived through moments, or years, of longing for a world without ambiguity, and for the stability of something unchangeable in human institutions? I don’t forget my own longings for certainty, which heartily resisted the pronouncement of Justice Holmes, that certainty generally is illusion and repose is not our destiny.<sup>112</sup>

As in constitutional interpretation, analysis of a complex political order such as the international community, within which the Security Council operates, is complicated and inevitably tenuous.

111. VCLT, *supra* note 94, art. 32 (emphasis added).

112. David H. Souter, Remarks at the Harvard University Commencement (May 27, 2010), *available at* <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech>.

An alternative to indeterminate legal analysis, then, would be to dismiss the possibility of legal considerations altogether, treat the issue of the Council's purpose as purely political, and allow power to answer the question of the Council's structure. The question must be resolved by someone—the Sovereign—but law would play an inconsequential role in this decision.<sup>113</sup>

However, this perspective cannot be viably applied to decisionmaking in a decentralized system. Within the international community, there is no single Sovereign. There are numerous actors—such as international and regional organizations, national governments, national parliaments, national courts, media, non-governmental organizations, industry and labor groups, multinational corporations, religious groups, and ultimately each individual citizen—who influence the decisionmaking process with varying degrees of success.<sup>114</sup>

Moreover, relying on a political decision to determine the Council's purpose would not resolve the current lack of clarity, since power is as uncertain as law, and often knowable only in hindsight.<sup>115</sup> Joseph Nye noted that “[f]or a concept that is so widely used, ‘power’ is surprisingly elusive and difficult to measure.”<sup>116</sup> However, this limitation does not make the concept “meaningless,” because we “experience power in our everyday lives, and it has real effects despite our inability to measure it precisely.”<sup>117</sup> Nye concluded that “analysts have been tempted to discard the concept as hopelessly vague and imprecise, but it has proven hard to replace.”<sup>118</sup> Similarly, Otto von Bismarck observed that “politics is not an exact science.”<sup>119</sup>

For instance, one high-ranking CIA official calculated aggregate power based on the following formula: perceived power = (population + territory + economy + military) x (strategy + will). After crunching the numbers, he assessed that in 1977 the Soviet Union was twice as powerful as the United States.<sup>120</sup> But, in just over a decade, the Soviet Union disintegrated and the United States was declared by many as the sole superpower in the world, suggesting that the prior analysis was flawed. This example demonstrates the difficulty of estimating with any accuracy how individual resources translate to power—a relationship that is unlikely to be characterized by a one-to-one function as assumed in the realist literature surveyed in Part I.

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113. See KAHN, *supra* note 70.

114. See JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 5 (2010) (International law is “made through the interactions of a variety of actors, including elites, the media, NGOs and ‘ordinary’ citizens.”).

115. Bart M.J. Szewczyk, *Georgia v. Russian Federation*, 105 AM. J. INT’L L. 747, 748 (2011).

116. JOSEPH S. NYE, JR., THE FUTURE OF POWER 3 (2011).

117. *Id.*

118. *Id.*

119. Otto von Bismarck, Speech to the Prussian Legislature (Dec. 18, 1863) (“Die Politik ist keine exakte Wissenschaft.”), reprinted in RALPH KEYES, THE QUOTE VERIFIER: WHO SAID WHAT, WHERE, AND WHEN 170 (2006).

120. RAY S. CLINE, WORLD POWER ASSESSMENT (1977).

In addition to its uncertainty, “[p]ower always depends on context.”<sup>121</sup> For example, after World War II “Josef Stalin scornfully asked how many divisions the pope had, but in the context of ideas five decades later the Papacy survived, whereas Stalin’s empire had collapsed.”<sup>122</sup> Nye pointed out that a “policy-oriented concept of power depends upon a specified context to tell us *who gets what, how, where, and when.*”<sup>123</sup>

Finally, power is contingent on the intensity of interests at stake, which are at times even more important than the underlying distribution of material and intangible resources. Andrew Moravcsik argued that:

Extensive empirical evidence supports this assumption. Even in least likely cases, where political independence and territorial integrity are at stake and military means are deployed, relative capabilities do not necessarily determine outcomes. A strong preference for the issue at stake can compensate for a deficiency in capabilities, as demonstrated by examples like the Boer War, Hitler’s remilitarization of the Rhineland, Vietnam, Afghanistan, and Chechnya. In each case the relative intensity of state preferences reshaped the outcome to the advantage of the weak.<sup>124</sup>

Thus, the degree to which any particular actor is effective depends on the material and intangible resources at its disposal, the intensity of interest involved, and the context of the specific issue. Each actor in the international community desires to maximize its long-term interest, realizes that it cannot do so on its own, and seeks allies with shared interests to pursue the same objectives. Without common interests—if all perceived interests of actors in the international community conflicted—there would be no United Nations or Security Council, but pure chaos and anarchy. In systems such as the international community, as Jutta Brunnée and Stephen Toope point out, “[l]aw does not depend on hierarchy between law-givers and subjects, but on reciprocity between all participants in the enterprise. . . . [Reciprocity] can exist only when actors collaborate to build shared understandings and uphold a practice of legality.”<sup>125</sup>

Therefore, political decisions depend on interests and context, which are after all issues of law since shared interests will be oftentimes reflected in contemporary legal documents routinely updated to reflect change over

121. NYE, *supra* note 116, at xiv.

122. *Id.* at xv.

123. *Id.* at 7 (citing HAROLD LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY* (1950)) (emphasis in original).

124. Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513, 524 (1997) (internal quotation marks and citations omitted).

125. BRUNNÉE & TOOPE, *supra* note 114, at 7; see also Jean-Marc Coicaud, *Legitimacy, Across Borders and Over Time*, in *FAULT LINES OF INTERNATIONAL LEGITIMACY* 17 (Hilary Charlesworth & Jean-Marc Coicaud eds., 2010) (“[L]egitimacy is defined as the governed recognizing the right of the governors to lead. . . . It is a process through which both political power and obedience are justified.”).

time.<sup>126</sup> Compare, in this regard, the European Union, which has been able to ensure that its legal rules broadly reflect shared understandings within its community through frequent treaty revisions and clarifications, though even it too has some gaps to fill between the written rules and the unwritten understandings.<sup>127</sup> In contrast, the Security Council has not clarified its current purpose with sufficient specificity, and is guided merely by the open-ended texture of Article 24 of the Charter, non-uniform subsequent practice, and a spectrum of potentially relevant rules.

In contrast to dismissing the problem as political and not susceptible to law, another approach to resolving the problem is introducing the concept of legitimacy in contradistinction to legality. Legality is consistency with written rules and procedures in reaching a decision. Legitimacy is the shared belief by the decisionmaker and the decision-receiver regarding permissible conduct within a particular community based on common interests. Both legality and legitimacy are sources of law.

In the case of the Security Council, legality is determined by the Charter, but legitimacy depends on a continuing process throughout the international community regarding the appropriateness of Council decisions. Under Article 25 of the Charter, all "Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."<sup>128</sup> Notwithstanding this clear legal obligation, Council decisions are rarely carried out by all members, are oftentimes contested, and ultimately depend on the support of specific actors for their effectiveness and legitimacy. Thus, Council decisions may be legal but illegitimate, or illegal but legitimate depending on the overlap between the inherited rules and contemporary expectations.

For instance, the Security Council's inaction with respect to the Rwandan genocide in 1994 was legal (given that the Charter provides for the Council's discretion in whether to intervene) but illegitimate (given the subsequent negative appraisals in the international community regarding this decision). In contrast, NATO's intervention in Kosovo was illegal (given that it was not authorized by the Security Council) but legitimate (given the widespread international public support for this decision as ultimately reflected in the doctrine of Responsibility to Protect).<sup>129</sup>

Such antinomy is not restricted to international law and occurs also in other legal systems. Consider the signing of the September 30, 1957 nuclear cooperation agreement between France and Israel on the building of a nuclear reactor in Dimona. According to one account, the French Prime Minis-

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126. See, e.g., BRUNNÉE & TOOPE, *supra* note 114, at 75 ("In the diffuse social relationships through which international law operates, treaties or custom can provide important snapshots of shared understandings.").

127. See Szewczyk, *supra* note 32.

128. U.N. Charter art. 25.

129. See *infra* Part III.A.

ter Maurice Bourges-Maunoury signed the agreement on October 1, a day after his government fell and he had no longer the necessary authority, but backdated it to the prior day at the suggestion of the Israeli negotiator Shimon Peres. Recounting the episode years later, Peres noted: "Such a date, another date, what difference does it make? . . . What is such a thing between friends?"<sup>130</sup> More recently, the Legal Adviser to the U.S. State Department Harold Koh discussed a similar potential antinomy in the context of U.S. support for the humanitarian intervention in Libya, which was authorized by the U.N. Security Council but did not receive congressional consent. According to one interview, "[c]iting his convictions as a human rights activist, [Koh] suggested that there was an inescapable tension 'between preventing atrocities and staying true to the letter and spirit of the War Powers Resolution.'" <sup>131</sup> While there are clear distinctions among these examples with respect to choosing between community rules and norms of friendship on the one hand, and between statutory law and fundamental rights on the other hand, the main thrust is that sources of legitimacy may conflict with sources of legality.

In a perfected legal order, there is complete overlap between legality and legitimacy; however, in a rapidly changing and complex political community, particularly when power is non-hierarchical rather than fully centralized in one focal point, the operational legitimacy criteria may diverge from established legal rules as the codification process is unable to fully capture and articulate the organizing principles.<sup>132</sup> Alternatively, the actual functioning of a legal system may reveal unanticipated tensions that need to be reconciled.

Consider, in this context, the relative ease of identifying legitimacy criteria in an absolute monarchy where power resides in the king and, thus, the king's will is the law, as opposed to the difficulty of identifying rules governing the international community, where power is diffused and shifting, and interests varied across actors.<sup>133</sup> The Council operates in a highly com-

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130. MICHAEL BAR-ZOHAR, SHIMON PERES: THE BIOGRAPHY 215 (2007) (quoting Shimon Peres). This perspective, whether consciously or inadvertently, echoed the statement purportedly made by a late-nineteenth century New York Congressman to President Grover Cleveland in response to the President's rejection of a bill on grounds of its unconstitutionality: "What's the Constitution among friends?" Symposium, *The United States: Champion or Violator of International Law?*, 87 AM. SOC'Y INT'L L. PROC. 133, 148 (1993).

131. Paul Starobin, *A Moral Flip-Flop? Defining a War*, N.Y. TIMES, Aug. 6, 2011 (quoting Harold Koh).

132. Robert D. Sloane, *More Than What Courts Do: Jurisprudence, Decision, and Dignity—In Brief Encounters and Global Affairs*, 34 YALE J. INT'L L. 517, 520 (2009) ("[D]ecisions of judges, executive officials, administrative officers, and other elites—those who qualify as politically relevant actors in liberal democracies—tend to be far more predictable than those made in the international legal system [or other decentralized political orders] because of the congruence of expectations of authority and control in a well-ordered state.").

133. See W. Michael Reisman, *On the Causes of Uncertainty and Volatility in International Law*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY 33 (Tomer Broude & Yuval Shany eds., 2008).

plex and changing order covering seven billion people and 193 nation-states where effectiveness and legitimacy are elusive.

Founders of the U.N. system anticipated this potential conflict over time between inherited legal rules and emerging norms of legitimacy. The Vienna Convention explicitly provides an opening for supplemental means of interpretation in case of ambiguity of the meaning of a treaty.<sup>134</sup> International lawyers drafting the Convention recognized the inherent complexities of the international community and did not presume to define all permissible methods of identifying law, which can be clarified by recourse to the concept of legitimacy as common interests.

### C. *Empirical Analysis of Legitimacy*

If the concept of legitimacy can supplement legal analysis due to the uncertainty of international law, how is legitimacy assessed? In contrast to many legitimacy analyses about the Security Council, which are primarily normative insofar as they assess how it should be reformed to conform to some set of *a priori* norms, this Article takes primarily an empirical approach, taking inspiration from Joseph Weiler's insightful Biblical reference that doing often comes before hearkening (or practice before principle). Noting that acts often occur in practice before they are fully understood in theory, Weiler quoted from Exodus 24:7—"And Moses wrote all the words of the Eternal . . . And he took the book of the Covenant and read in the audience of the people: And they said, All that the Eternal hath spoken we will do, and hearken."<sup>135</sup> Or as Paul Kahn put it, "existence determines essence."<sup>136</sup>

Inevitably, both the analyst and the advocate combine empirical assessment and normative prescription. As Robert Keohane pointed out:

We do not study international relations for aesthetic reasons, since world politics is not beautiful. If we sought scientific rigor we would have pursued careers in experimental disciplines. Instead we are motivated by normative questions, often asked urgently in the wake of disasters, from the Sicilian Expedition (416 BCE) chronicled by Thucydides to the Anglo-American invasion of Iraq (2003 CE). Recurring failures lead us to try to understand the conditions under which states and other actors can achieve their collective purposes rather than engage in destructive, and often self-destructive, behavior. Our normative purposes infuse our positive analysis.<sup>137</sup>

134. See VCLT, *supra* note 94, art. 32.

135. WEILER, *supra* note 72, at 5.

136. KAHN, *supra* note 70, at 53.

137. See Robert O. Keohane, *Big Questions in the Study of World Politics*, in OXFORD HANDBOOK OF INTERNATIONAL RELATIONS 708 (Christian Reus-Smit & Duncan Snidal eds., 2008).



However, it is important to remember the appropriate weight of emphasis between the two functions for each role. The role of a scholar or observer is different from that of an actor or participant insofar as the former should primarily focus on empirical analysis to help explain and understand social phenomena, in the words of Anthony Giddens,<sup>138</sup> whereas the latter inevitably articulate normative prescriptions since they directly influence the social process. As Lung-chu Chen explained, the appropriate observational standpoint is to be “as free as possible from parochial interests and cultural biases [in order to] clarify for the active participants in the different communities common interests that these participants are otherwise unable to perceive.”<sup>139</sup> Since there are numerous actors with various normative positions articulated over time, the role of a scholar is to draw linkages among the many aspects of the Security Council’s experience to clarify what, if anything, binds the Security Council together.

As other scholars have noted, there is no simple methodology to assess legitimacy empirically, for it is a matter of degree, complexity, and ambiguity. Margaret Levi, a former President of the American Political Science Association, argued that “[l]egitimacy is a complex concept that includes many elements, but no one—including Max Weber himself—has successfully sorted out which of the various elements are necessary or how to measure indicators or their interactions.”<sup>140</sup> Similarly, David Beetham and Christopher Lord acknowledged that “[t]he starting point for any analysis of legitimacy, therefore, has to be an acknowledgment of its complexity, and of the full range of factors—rules, normative beliefs, actions and procedures—that contribute to making political authority rightful.”<sup>141</sup>

Some have questioned the utility of analyzing legitimacy altogether and even suggested that it may be a dangerous exercise subject to abuse. In the aftermath of the war in Iraq, for example, James Crawford pointed to significant risks associated with the concept of legitimacy:

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138. See generally ANTHONY GIDDENS ET AL., *INTRODUCTION TO SOCIOLOGY* (2009).

139. LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE* 14 (2d ed. 2000).

140. Margaret Levi, *Why We Need a New Theory of Government*, 4 *PERSP. ON POL.* 5, 13 (2006).

141. DAVID BEETHAM & CHRISTOPHER LORD, *LEGITIMACY AND THE EUROPEAN UNION* 5 (1998). Similarly, Beetham observed:

How far power is legitimate, what makes it so, and why it matters: these are all inherently difficult and contentious questions . . . . These questions have also been the special concern of different groups of professionals—legal experts, moral or political philosophers, social scientists, to name but three—who have each approached them from a different focus of interest, and have tended to employ different conceptions or definitions of legitimacy according to their respective professional standpoint. So in addition to the inherent difficulty of deciding what makes power legitimate, there is the extra complication of divergent definitions offered by different groups of professionals. It is this double layer of complexity that makes the subject of legitimacy so confusing.

DAVID BEETHAM, *THE LEGITIMATION OF POWER* 3 (1991).

[I]n recent discourse there has been very little attempt to use it [legitimacy] in a discriminating way, despite attempts at more rigorous analysis by Franck and others. Instead it has been applied as a loose substitute for “legality,” a way of glossing over difficulties presented by international action. It has given cover to the big battalions whose conduct has appeared to be morally driven but has nonetheless not been generally approved. Increasingly the fuzziness and indeterminacy of legitimacy-speak has seemed to allow us to break free from disciplinary constraints and to assert and impose our own moral intuitions, shared or unshared, on various target audiences.<sup>142</sup>

According to this perspective, the uncertainty and potential malleability of legitimacy analysis strongly caution against its use altogether. To avoid these potential dangers, the argument holds, political decisionmakers and the public they represent should seek comfort and justification in long-established legal rules and procedures regardless of new circumstances or challenges.

However, this critique appears to conflate legitimacy of a community and morality of an actor. Each individual, of course, will have certain views of morality, but empirical legitimacy is supposed to reflect shared understandings of appropriate behavior in a system of decisionmaking over time.

Moreover, inquiries into the legitimacy of a political institution or decision appear inescapable, since the freedom of will, thought, judgment, and decision is ever-present in the human condition and legal arrangements—for good or ill.<sup>143</sup> Choice and agency are inherent to any decision, whether in interpreting inherited rules or orienting towards future policies. Andrew Moravcsik points out that the issue of the sources of legitimacy of other international institutions “is emerging as one of the central questions—perhaps *the* central question—in contemporary world politics.”<sup>144</sup> Similarly, Robert Keohane and Allen Buchanan observe that “[d]etermining whether global governance institutions are legitimate—and whether they are widely perceived to be so—is an urgent matter.”<sup>145</sup> Even Crawford’s forceful cri-

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142. James Crawford, *The Problems of Legitimacy-Speak*, 98 AM. SOC’Y INT’L L. PROC. 271, 271 (2004); see also Mary Ellen O’Connell, *The End of Legitimacy*, 98 AM. SOC’Y INT’L L. PROC. 269 (2004) (recommending “reject[ing] the approach that some uses of force are still legitimate even if they are unlawful [since] [i]t invites us to decide on personal moral grounds rather than community-based legal grounds the acceptability of a use of force. Instead of community-authorized decision-making bodies assessing uses of force on the basis of existing rules, national leaders can decide on the basis of their own personal moral views.”).

143. See KAHN, *supra* note 70.

144. Andrew Moravcsik, *Is there a ‘Democratic Deficit’ in World Politics? A Framework for Analysis*, 39(2) GOV’T & OPPOSITION 336 (2004) (emphasis in original); see also Robert O. Keohane, *Accountability in World Politics*, 29(2) SCANDINAVIAN POL. STUD. 75 (2006); Robert O. Keohane, *Global Governance and Democratic Accountability*, in *THE GLOBAL GOVERNANCE READER* (Rorden Wilkinson ed., 2005).

145. Buchanan & Keohane, *supra* note 73, at 406.

tique was addressed primarily towards lawyers and left “legitimacy . . . for others to judge.”<sup>146</sup>

Yet, legitimacy is an appropriate subject of study especially for lawyers, as well as political scientists, since the former are after all specialists in identifying and interpreting sources of authority as well as bases of power.<sup>147</sup> As the U.S. Supreme Court Justice Oliver Wendell Holmes noted long ago, “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation.”<sup>148</sup> Faced with difficult new facts or legal questions, lawyers and legal scholars routinely apply their analytical and interpretive skills to assess the legitimacy, as well as the legality, of a decision or an institution based on consistency with accepted sources of authority. At times, widely accepted decisions or institutions may be at odds with prior sources of authority, such that lawyers are charged with the responsibility to determine whether the two can be reconciled. For instance, Bruce Ackerman and David Golove raised the provocative question of whether the North American Free Trade Agreement is consistent with the U.S. Constitution, with all the potential consequences if the answer was in the negative.<sup>149</sup> Similarly, to avoid repeating the U.S. Senate rejection of the League of Nations treaty—and its disastrous impact on world history—Myres McDougal and Asher Lans argued that treaties were not the only constitutional option available to Presidents to enter into binding international agreements, but that congressional-executive or Presidential agreements may operate as appropriate substitutes.<sup>150</sup> “Lawyers,” Oscar Schachter once quipped, “are accustomed to pouring new wine into old bottles”<sup>151</sup> to determine the appropriateness of certain new practices in light of established community purposes and principles. Indeed, numerous assessments presume a substantive distinction between legality and legitimacy and consider analysis of legitimacy to be a useful and relevant exercise independently of inquiries into legality.<sup>152</sup> Similarly, no one questions the legality of the Security Council, but there are persisting questions as to its legitimacy.

#### D. Norms of Legitimacy

In international law, empirical approaches to legitimacy (as opposed to normative approaches based on democracy) can be divided into two catego-

146. Crawford, *supra* note 142, at 273.

147. See, e.g., W. MICHAEL REISMAN & AARON M. SCHREIBER, *JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW* (1987).

148. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

149. BRUCE ACKERMAN & DAVID GOLOVE, *IS NAFTA CONSTITUTIONAL?* (1995).

150. See Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 206 (1945).

151. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 86 (1991).

152. See *infra* notes 232–239.

ries: procedural or input-based legitimacy and substantive or output-based legitimacy.

Thomas Franck provided the following definition of procedural legitimacy: "Legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."<sup>153</sup> Under this formulation, legitimacy's effect on conduct arises due to its inherent "pull," rather than due to "coercive authority."<sup>154</sup> Thus, Franck hypothesized that the best laboratory to observe the role of legitimacy would be the international order because there is no world sovereign or government enforcing rules of international law through coercion.<sup>155</sup>

Based on an analysis of the effectiveness of certain rules or norms in explaining international behavior, Franck concluded that the degree of legitimacy of a specific rule will depend on four characteristics of the rule: determinacy, symbolic validation, coherence, and adherence. First, a rule's determinacy is provided by its "textual clarity" or a legitimate interpretive "clarifying process" (such as an independent tribunal).<sup>156</sup> For instance, a specific rule of absolute diplomatic immunity, be it for parking tickets or murder, is more likely to explain behavior than a general rule of proportionality in *jus in bello* or the right to self-determination, which can be subject to different interpretations.<sup>157</sup> Second, symbolic validation, ritual, and pedigree enhance a rule's legitimacy by relating to established practice. Third, the coherence of a rule is the extent to which it relates logically to other rules and is applied consistently across cases such that likes are treated alike, rather than arbitrarily in a "checkerboard" manner.<sup>158</sup> Finally, a rule's legitimacy is also dependent on its adherence to an "infrastructure of rules about rules" that identifies "how rules are to be made, interpreted, and applied."<sup>159</sup> Such secondary rules—e.g., *pacta sunt servanda* or the establishment of customary international law through practice and *opinio juris* (binding belief) of states—are assumed to be inherent and incidental to the status of members in the underlying international community, viz., statehood. Franck concluded, however, that the "ultimate rule of recognition," by which one can claim to observe a rule, "cannot be demonstrated by reference to any other validating rules or procedures, but only by the conduct of nations manifesting their belief in the ultimate rules' validity *as the irreducible prerequisites for an international concept of right process*. It can only be in-

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153. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 20, 24 (1990) (emphasis omitted); see also Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988).

154. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS*, *supra* note 153, at 26.

155. *Id.* at 49.

156. *Id.* at 66.

157. See *id.* at 50–90.

158. See *id.* at 138–44.

159. *Id.* at 184.

ferred, that is, from the nature of the international system as a community of states.”<sup>160</sup>

But in a subsequent analysis of the question of legitimacy, Franck acknowledged the role of interest and power in shaping the rules of the international system and the conduct of states in that system, but argued that legitimate decisions are those that serve long-term national interests. He distinguished “between a longer view of national interest and a narrower, more immediate approach to interest gratification . . . . The former, however, takes fully into account the power of legitimacy, while the latter focuses only on the legitimacy of power.”<sup>161</sup> However, it is unclear why the important factor is the temporal scope of a nation’s interest rather than the commonality of interest among nations or other international actors.

Franck’s primary insight is in persuasively demonstrating that there is a certain method or right process through which legitimacy of a proposed rule can be enhanced. The content of any communication will be more persuasive—and exert more pull, in Franck’s terms—given clear oratory (determinacy), internal and external logic (coherence and adherence), and a downgrading of potential opposition by claims to everlasting truths (symbolic validation).<sup>162</sup> However, there are two main flaws in his analysis that limit the applicability of his theory in general and its value in enhancing the Security Council’s legitimacy in particular.

First, Franck’s assumption that the effectiveness of rules in the international system does not depend on coercion is untenable. While he is correct in observing that there is no single world sovereign or government enforcing its commands as a political superior,<sup>163</sup> Franck ignores the periodic—and effective—mobilization of state and non-state actors in defense of certain norms, such as the prohibition against aggression or genocide (e.g., interventions in Iraq in 1991 and in Kosovo in 1999). Moreover, potential retaliation by one state constrains the violation of a norm by another, e.g., most prominently in the context of international trade. Without discussing the role of power and interest in affecting a rule’s pull toward compliance, Franck focuses primarily on the style in which a rule is expressed. As such, the analysis is helpful in identifying which rules are likely to be more legiti-

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160. *Id.* at 194 (emphasis in original).

161. Thomas M. Franck, *The Power of Legitimacy and Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT’L L. 88, 106 (2006).

162. For a procedural explanation of compliance, see also TOM R. TYLER, WHY PEOPLE OBEY THE LAW: PROCEDURAL JUSTICE, LEGITIMACY, AND COMPLIANCE (1990); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003); Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law*, 28 HOFSTRA L. REV. 707 (2000). For a specific application of this approach, see Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC’Y REV. 513 (2003).

163. See JOHN AUSTIN, LECTURES ON JURISPRUDENCE 270 (1869) (“Every positive law, or every law simply and strictly so called, is set, directly or circuitously, by a sovereign person or body, to a member or members of the independent political society wherein that person or body is supreme.”).

mate, but fails to provide greater understanding into why certain rules are followed and what purpose they serve. Inherently, legitimacy cannot be analyzed separately from the power that it purports to justify.

Second, Franck inappropriately restricts his analysis to states as the only actors in international politics, disregarding non-governmental organizations or international institutions. Though for certain limited purposes it can still be useful to treat states as unitary “black boxes,” most analyses of international relations are more nuanced and recognize the relevance of all organized groups, such as nations, governments, multinational corporations, interest groups, as well as gangs and terrorist groups.<sup>164</sup> This observation applies with special force to the international community, which has a plethora of regional and sub-national agencies and institutions.

In contrast to Franck’s view of the state as the atomic, non-divisible actor in international politics, Harold Lasswell and Myres McDougal developed an anthropocentric view of all politics, from the local level of two interacting and mutually-influencing individuals to the global level of the world community, wherein “*man* pursu[es] *values* through *institutions* using *resources*.”<sup>165</sup> Legitimate or “authoritative decision always requires a choice among values and has impact upon the distribution of values within a community” as well as outside the community.<sup>166</sup> A decision is legitimate from the perspective of those actors whose interests are improved, or at least not harmed, and will be resisted by those whose interests are threatened. An illegitimate decision is overturned over time as the initial actors turn out to be ineffective relative to the level of resistance. This perspective views legitimacy, and law, as the process through which effective actors clarify and secure their common interests. And given the decentralized nature of the international community, numerous actors are effective and have *de facto* soft veto power over the Council<sup>167</sup> since their consent and cooperation is necessary for the effectiveness of the Council’s decisions.<sup>168</sup> For instance, contemporary demands of human rights and democratic values expressed by non-state actors have

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164. See, e.g., CHRISTOPHER HILL, *THE CHANGING POLITICS OF FOREIGN POLICY* (2003); ROBERT O. KEOHANE, *POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD* (2002); JOSEPH S. NYE, JR., *POWER IN THE GLOBAL INFORMATION AGE: FROM REALISM TO GLOBALIZATION* (2004); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

165. HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY* 142 (1992) (emphasis in original).

166. *Id.* at 217.

167. I am grateful to Bruce Ackerman for suggesting this point.

168. For instance, President Obama noted that “the days are gone when Roosevelt and Churchill could sit in a room and solve the world’s problems over a glass of brandy. . . . In this century, [leadership] require[s] building new partnerships, adapting to new circumstances, and remaking ourselves to meet the demands of a new era.” President Barack Obama, Remarks to Parliament in London, United Kingdom (May 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/05/25/remarks-president-parliament-london-united-kingdom>. This statement, from the head of state of a major global power, reflects a widespread perception of the multiplicity of effective actors in the contemporary world.

shifted the Council's practice towards the doctrine of the Responsibility to Protect.<sup>169</sup>

From this approach, the concept of legitimacy, though not inherently objective nor a proxy for specific ideals, nonetheless retains great utility in political analysis, as it serves to clarify the prevalence and intensity of interests at stake in any given decision or exercise of power. It differentiates arbitrary and ephemeral decisions from those that are intended to be stable and persist over time, and those that are exclusive and parochial from those that are inclusive and cosmopolitan. In this manner, legitimacy enables thinking, planning, and deciding over time, as it institutes some sense of predictability to the exercise of power. Such lowering of uncertainty associated with decisions over the simple passage of time appears to be generally consistent with the overall risk-averse nature of human beings.<sup>170</sup> All else being equal, order is preferred to chaos and stability to uncertainty.

Empirical analysis of legitimacy does not deny the existence of normative and ethical choices in political decisions and political orders. Indeed, each individual dissatisfied with a particular order or decision has some power to influence it, from public civil disobedience to covert conspiratorial resistance, until the ultimate sacrifice of one's life.<sup>171</sup> And after all, changes in a community's norms of legitimacy always begin with individuals deciding to change the status quo according to their normative beliefs. Although the Council for the time being cannot be restructured according to a democratic model of legitimacy, as demonstrated in Part I, the Article adopts the normative position that the Council should interpret its responsibility for maintenance of international peace and security in favor of promoting democratic values and human rights.

The relative usefulness of the two input-based and output-based legitimacy approaches depends on the question posed. The legitimacy of specific resolutions of the Council would be enhanced based on the procedural model. Recall in this regard the controversy surrounding the sanctions regime under Resolution 1267 for terrorist financing, where criteria for listing

169. See *infra* Part III.A.

170. See, e.g., KENNETH J. ARROW, ASPECTS OF THE THEORY OF RISK-BEARING (1965); DANIEL KAHNEMAN, PAUL SLOVIC & AMOS TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (1982); JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944); Milton Friedman & Leonard P. Savage, *The Utility Analysis of Choices Involving Risk*, 56 J. POL. ECON. 279 (1948).

171. For the continuing role of sacrifice in contemporary politics, see KAHN, *supra* note 70. As much as anything, Winston Churchill's speeches eloquently and vividly illustrate this possibility of and readiness for the ultimate sacrifice:

I am convinced that every man of you would rise up and tear me down from my place if I were for one moment to contemplate parley or surrender. If this long island story of ours is to end at last let it end only when each one of us lies choking in his own blood upon the ground.

Prime Minister Winston Churchill, Speech to Cabinet in London, United Kingdom (May 28, 1940), quoted in MARTIN GILBERT, WINSTON CHURCHILL'S WAR LEADERSHIP 23 (2004); see also ROY JENKINS, CHURCHILL: A BIOGRAPHY 608 (2001).

and delisting individuals or groups were unclear, the process was opaque, and the ultimate decisions appeared *ad hoc* and arbitrary.<sup>172</sup>

However, the question of the wider purpose that the Council should serve and the membership it should contain cannot be answered procedurally. Those problems would not be alleviated simply through clearer communication. And they cannot be resolved by a single decisionmaker in a purely political decision; as Judge Aharon Barak often states, “law is everywhere.”<sup>173</sup> Ultimately, the solution to the Council’s purpose will depend on law and whether actors in the international community—the Security Council, General Assembly, and all participants in the process—reach a shared understanding regarding the common interests that the Council should serve. In this endeavor, the text of Article 24 of the Charter providing for the Council’s responsibility for maintenance of international peace and security is still the starting point given the consensus surrounding it, but is not the final point.

### III. INCLUSIVE CONTEXTUAL COOPERATION IN THE UNITED NATIONS

To fully understand the meaning of the Council’s responsibility for international peace and security, the legal analysis of Article 24 in Part II must be supplemented with legitimacy analysis. Norms of legitimacy are based on contemporary shared understandings of the international community as reflected in the normative reactions to the Council’s decisions in particular crises. How these shared understandings develop and shift rules of legality can be observed through the Council’s and the international community’s responses to crises in Bosnia, Kosovo, and Libya.

#### A. *Development of Shared Understandings*

*Bosnia.* Following declarations of independence in Slovenia and Croatia in 1991, Bosnia held a referendum in which Bosniaks and Bosnian Croats overwhelmingly voted for independence, whereas Bosnian Serbs, who preferred to remain within Yugoslavia, mostly boycotted the vote. On April 7, 1992, the European Community and the United States, among others, recognized Bosnia as a sovereign state and a civil war erupted among the three ethnic groups in what became the bloodiest conflict in Europe since World War II. In response to the emerging crisis, the Security Council extended the mandate of the previously-established U.N. Protection Force (“UNPROFOR”) to cover Sarajevo and its airport in order to deliver humanitarian assistance.<sup>174</sup> It also continued an arms embargo that had been imposed on all of

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172. See *supra* Part I.C.

173. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 309 (2006).

174. S.C. Res. 758, U.N. Doc. S/RES/758 (June 8, 1992).



former Yugoslavia,<sup>175</sup> imposed sanctions on Serbia,<sup>176</sup> and established a no-fly zone over Bosnia.<sup>177</sup> Yet, notwithstanding numerous Security Council resolutions on Bosnia—and extensive collective resources—the Security Council was incapable of fulfilling its obligations during the initial years of fighting among the Bosniak, Croat, and Serb factions due to a lack of agreement over its purpose. Given the Security Council’s responsibility for international peace and security, some argued that the war in Bosnia constituted an internal conflict beyond the Council’s jurisdiction. Others viewed humanitarian atrocities as a matter of international concern and cause for collective action.<sup>178</sup>

Even after the Council authorized U.N. member states, unilaterally or through regional organizations, to use “all necessary measures, through the use of air power” to protect and support UNPROFOR in its humanitarian assistance,<sup>179</sup> no military support was provided until NATO’s air strikes ten months later in April 1994.<sup>180</sup> When the NATO air campaign finally began, it was controversial due to its novelty, potentially open-ended nature, and continued disagreement as to what purpose it was supposed to serve: merely protecting and supporting UNPROFOR, or protecting Bosnian civilians through broader military action. In the end, continued NATO bombing enabled military gains by local actors—the Bosniak and Croat forces—and eventually compelled the warring parties to negotiations, which ultimately resulted in the General Framework Agreement for Peace in November 1995.<sup>181</sup>

Due to its persistent internal dissensus regarding common objectives in Bosnia, the Security Council was unable to prevent the approximately 100,000 deaths and nearly half of the Bosnian population being displaced by the war.<sup>182</sup> Its delayed response, as well as that of the international community, was widely perceived to be unacceptable in the contemporary world.<sup>183</sup> At no stage of this three-year process is it clear that an enlarged Security Council would have aided in its mission to maintain international peace and security, since the primary issue was the very meaning of its responsibilities rather than insufficient capabilities.

175. S.C. Res. 713, U.N. Doc. S/RES/713 (Sept. 25, 1991).

176. S.C. Res. 757, U.N. Doc. S/RES/757 (May 30, 1992).

177. S.C. Res. 781, U.N. Doc. S/RES/781 (Oct. 9, 1992).

178. For some of the historical accounts of this period, see IVO H. DAALDER, *GETTING TO DAYTON: THE MAKING OF AMERICA’S FOREIGN POLICY* (2000); DOBBINS, *supra* note 87; RICHARD HOLBROOKE, *TO END A WAR* (1998); BRENDAN SIMMS, *UNFINEST HOUR: HOW BRITAIN HELPED TO DESTROY BOSNIA* (2003).

179. S.C. Res. 836, ¶ 10, U.N. Doc. S/RES/836 (June 4, 1993).

180. See DANIEL L. BETHLEHEM & MARC WELLER, *THE ‘YUGOSLAV’ CRISIS IN INTERNATIONAL LAW, PART 1: GENERAL ISSUES* (1997).

181. For some of the historical accounts of this period, see DAALDER, *supra* note 178; DOBBINS, *supra* note 87; HOLBROOKE, *supra* note 178.

182. See Research and Documentation Center, *Human Losses in Bosnia and Herzegovina 91–95* (2007), available at <http://www.idc.org.ba/presentation/content.htm>.

183. See, e.g., SIMMS, *supra* note 178.

In the final analysis, collective action of the international community, authorized by the Security Council, was executed by a select group of actors, consisting of NATO (led by the United States) and local Bosniak and Croat military forces. And as much as NATO was instrumental to the success of the military campaign, the EU has been the lead institution responsible for civilian reconstruction and international governance in Bosnia, notwithstanding the existence of a much broader Peace Implementation Council (consisting of over fifty countries and international agencies) and the formal oversight authority of the Security Council.<sup>184</sup>

*Kosovo.* Several years later after the war in Bosnia, the international community nearly repeated the same mistakes with similarly grave consequences in Kosovo. In 1998, Serbian President Slobodan Milošević, who had been responsible for war crimes in Bosnia, ordered a military campaign against the Kosovo Liberation Army, which led to mass expulsions of 800,000 ethnic Albanians and numerous other crimes against humanity.<sup>185</sup> The escalating tensions between Kosovo and Serbia led to armed conflict, with Serbia using “excessive and indiscriminate force” that resulted in damage to civilian property, population displacement, and civilian deaths.<sup>186</sup> After ongoing fighting between the Kosovo Liberation Army (“KLA”) and the Serbian military throughout the year, the Security Council adopted Resolution 1199 calling for a cease-fire,<sup>187</sup> but with little effect. Given the history of violence against civilians in Bosnia by the Serbian government under Slobodan Milošević and evidence of new human rights violations, there was grave concern that “worse things were in store.”<sup>188</sup> Having pursued economic and diplomatic options at the so-called Rambouillet Peace Talks and with increasing signs of an ensuing humanitarian disaster (e.g., a massacre of Kosovar civilians in January 1999), NATO authorized airstrikes against Serbia to protect the Kosovar civilian population.<sup>189</sup> NATO (led again by the

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184. See Bart M.J. Szewczyk, *The EU in Bosnia and Herzegovina: Powers, Decisions, and Legitimacy*, EUISS OCCASIONAL PAPER No. 83 (2010).

185. See *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009) (noting that earlier suspicions proved true that Serbian and FRY forces displaced over 800,000 Kosovars and engaged in a broad campaign of violence against the civilian population, including violence and well-documented cases of murder, sexual assault, and intentional destruction of mosques); see also HUMAN RIGHTS WATCH, UNDER ORDERS: WAR CRIMES IN KOSOVO (2001); Status of Kosovo, EUISS Chaillot Paper No. 114, at 16 (2008), available at <http://www.iss.europa.eu/uploads/media/cp114.pdf>.

186. See *Milutinović*, Case No. IT-05-87-T, at 341.

187. S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998).

188. W. Michael Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860, 860 (1999).

189. Press release, NATO, Statement by the North Atlantic Council on Kosovo, ¶5, NATO Press Release (99)12 (Jan. 30, 1999), available at <http://www.nato.int/docu/pr/1999/p99-012e.htm> (“NATO is ready to take whatever measures are necessary in the light of both parties’ compliance with international commitments and requirements, including in particular assessment by the Contact Group of the response to its demands, to avert a humanitarian catastrophe, by compelling compliance with the demands of the international community and the achievement of a political settlement. The Council has therefore agreed today that the NATO Secretary General may authorise air strikes against targets on FRY territory.”).

United States) began military air strikes against Serbia in March 1999.<sup>190</sup> It was able to decisively end the military conflict in Kosovo and stop the mass killings, though at a cost of civilian casualties during the bombing.<sup>191</sup> Some scholars even argued that NATO's intervention caused more casualties than it prevented.<sup>192</sup> Local actors such as the KLA also played an important role, albeit not as extensively as during the Bosnian conflict. And a significant part of the struggle occurred via the international media, where NATO and the Serbian government competed for public support internally and externally. The former NATO Secretary-General Lord George Robertson pointed out that NATO:

didn't win because of [its] superior military might. We won because we never contemplated defeat and because we persuaded Milosevic and his generals that we would simply never give up. We ran a military campaign and in parallel we ran an information campaign. Both were professional and focused but it was, to my mind looking back now, that *it was the information campaign in many ways that won the conflict*.<sup>193</sup>

After undergoing eleven weeks of intense NATO bombing, Serbia agreed to withdraw troops from Kosovo, recognize its autonomy, and not oppose the introduction of a United Nations-run government in the territory. Throughout this process, the Security Council was internally deadlocked over the interests at stake and appropriate course of action, particularly with Russia threatening to use its veto power to protect its ally Serbia and with China opposing interference with what it perceived as an internal conflict not within the Council's jurisdiction. Just as with Bosnia, a larger Security Council would not have fared any better than it did here.

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190. See *Milutinović*, Case No. IT-05-87-T.

191. See Richard B. Bilder, *Kosovo and the "New Interventionism": Promise or Peril?*, 9 J. TRANSNAT'L L. & POL'Y 153, 168 (1999) ("To its credit, NATO appears to have tried to avoid civilian casualties. But, perhaps due particularly to NATO's decision to avoid the risk of NATO military casualties by resorting only to very high-level bombing and remote missile strikes, there were a growing number of instances of what NATO called 'regrettable collateral damage' to civilians, culminating in the bombing of the Chinese Embassy in Belgrade."); Peter Hiphold, *The Kosovo Case and International Law: Looking for Applicable Theories*, 8 CHINESE J. INT'L L. 47, 50 (2009) ("There can be no doubt that this intervention was decisive for the ending of the military conflict in Kosovo and for stopping the mass killings there. At the same time, it cannot be denied that the intervention itself caused many casualties and that it occurred in violation of the UN Charter and, in particular, in violation of the most basic principle of this document, the prohibition of the use of force.").

192. See Julie Mertus, *The Imprint of Kosovo on the Law of Humanitarian Intervention*, 6 ILSA J. INT'L & COMP. L. 527, 538 (2000) ("Particularly troubling is the choice of targets in the NATO campaign and the adequacy of its efforts to limit civilian casualties."); Alexander Orakhelashvili, *Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo*, 12 MAX PLANCK Y.B.U.N.L. 1 (2008) ("By the end of the NATO intervention, the number and extent of human casualties and suffering among the Kosovo Albanians has been much higher than before the NATO intervention.").

193. Lord George Robertson, Former Secretary General of NATO, Makins Lecture at the Atlantic Council (Mar. 2, 2010), available at <http://www.acus.org/event/lord-robertson-transatlantic-leadership/transcript> (emphasis added).

It was only after NATO's action that the Security Council passed Resolution 1244, establishing the U.N. Interim Administration Mission in Kosovo UNMIK and recognizing NATO's role in "establish[ing] the international security presence in Kosovo."<sup>194</sup> Notably, although NATO's military intervention was not authorized by the Security Council *ex ante*, the Independent International Commission on Kosovo, an independent body of thirteen international law experts from around the world, concluded *ex post* that the action was "illegal but legitimate."<sup>195</sup> Michael Reisman seemed to concur with this assessment of procedural illegality and substantive legitimacy. Even though the "procedures for deciding and appraising the lawfulness of the Kosovo action were not those contemplated by the [United Nations] Charter," he concluded emphatically that "if the circumstances require, it should—it must—be done again!"<sup>196</sup>

Indeed, the international community's response to the Council's inaction during the Kosovo crisis gradually altered perceptions of the Council's responsibility for international peace and security.<sup>197</sup> NATO's intervention, though unauthorized by the Council, was deemed to be legitimate by the international community and illustrated the need to change the legal rules.

With this objective, the International Commission on Intervention and State Sovereignty, an *ad hoc* body of twelve international lawyers and foreign policy experts established at the request of the Canadian government, proposed the concept of the Responsibility to Protect ("R2P").<sup>198</sup> Four years later at the 2005 World Summit, the U.N. General Assembly endorsed this concept and declared that:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authori-

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194. S.C. Res. 1244, ¶7, U.N. Doc. S/RES/1244 (June 10, 1999); see also Erika de Wet, *The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX*, 103 AM. J. INT'L L. 83 (2009); Enrico Milano, *Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status*, 14 EUR. J. INT'L L. 999 (2004).

195. INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT (2000), Executive summary, Main Findings, available at <http://reliefweb.int/sites/reliefweb.int/files/resources/F62789D9FCC56FB3C1256C1700303E3B-thekosovoreport.htm>.

196. Reisman, *supra* note 188, at 862.

197. See, e.g., HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (J.L. Hozgrefe & Robert O. Keohane eds., 2003).

198. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, RESPONSIBILITY TO PROTECT (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

ties manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>199</sup>

In 2006, in turn, the Security Council confirmed its “responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity” as part of its responsibility for international peace and security.<sup>200</sup> This clarification of the Council’s purpose provided for unity and vigor during the Libyan crisis, where the Council’s legitimacy and effectiveness were at their peak in the post-Cold War era.

*Libya.* In Libya, the humanitarian crisis developed much more quickly than in the prior two cases, but so did the Council’s intervention. In response to peaceful protests that began on February 15, 2011 in opposition to Col. Muammar el-Qaddafi’s rule, the Libyan regime deployed military force to suppress the protests.<sup>201</sup> The following week, the League of Arab States condemned the violence against civilians and suspended Libya’s membership.<sup>202</sup> In turn, the Security Council issued a similar condemnation, called for a cease-fire, and referred the case to the International Criminal Court to investigate the possibility of war crimes.<sup>203</sup> Subsequently, the Arab League called for the imposition of a no-fly zone over Libya to protect civilians.<sup>204</sup> On March 16, Qaddafi escalated the crisis by threatening a large-scale massacre with his troops poised outside Benghazi, a city of over 500,000 people. In language associated with prior acts of genocide and crimes against humanity, he warned: “We will come house by house, room by room. It’s over. The issue has been decided. . . . We will find you in your closets. We will have no mercy and no pity.”<sup>205</sup> Given this imminent risk and with the request from the Arab League, the Security Council authorized “all necessary measures . . . to protect civilians and civilian populated areas under threat of attack” in Libya, including imposing a no-fly zone and providing arms.<sup>206</sup> Two days later, select NATO countries (this time, led by the United Kingdom and France rather than the United States, due to the relative intensity of their respective interests) began air strikes against Libyan military targets that constituted an ongoing threat to the civilian population. By early September 2011, the opposition movement was able to take control over much

199. 2005 World Summit Outcome, ¶139, U.N. Doc. A/60/L.1 (Sept. 15, 2005).

200. S.C. Res. 1674, ¶4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

201. Sudarsan Raghavan, *Libyan regime under threat*, WASH. POST, Feb. 21, 2011, at A1.

202. Editorial, *Stopping Qaddafi*, N.Y. TIMES, Feb. 25, 2011, at A26.

203. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

204. See Dan Bilefsky, *Security Council Uncertain About Intervening in Libya*, N.Y. TIMES, Mar. 16, 2011, available at <http://www.nytimes.com/2011/03/16/world/africa/16nations.html> (“Lebanon, the [Security Council’s] only current Arab member, presented the Arab League’s request to the council to authorize a no-flight zone to protect Libyan civilians. Lebanese diplomats said that authorizing the no-flight zone had become urgent as Col. Qaddafi’s forces continued to advance.”).

205. Dan Bilefsky & Mark Landler, *Military Action Against Qaddafi Is Backed by U.N.*, N.Y. TIMES, Mar. 18, 2011, at A1 (quoting Colonel Qaddafi).

206. S.C. Res. 1973, ¶¶ 4, 6, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (superseding the arms embargo imposed by paragraph 9 of Resolution 1970 and authorizing a no-fly zone).

of the capital, Tripoli, along with other key cities and strategic points in Libya.<sup>207</sup> The impending humanitarian disaster was averted and civilian deaths, though not completely prevented as during the Kosovo crisis,<sup>208</sup> were significantly reduced through the international intervention. Even the high estimates of 30,000 to 50,000 casualties, according to Libya's new government, let alone the hundreds of war dead registered in Libya's morgues from both sides of the conflict,<sup>209</sup> were substantially lower than the threat posed by Qaddafi's forces just to the city of Benghazi.

The list of actors in resolving the Libyan crisis included the same members of the P-5 operating through NATO, regional actors such as Qatar and the United Arab Emirates, and even more significantly than during the Bosnian and Kosovar conflicts, the local rebel movement. In addition, the Arab League was of catalytic importance. Its resolution calling for the Security Council to impose a no-fly zone "changed everything" by galvanizing international public opinion in support of the intervention and preventing regional resistance during the military mission.<sup>210</sup> Arab League Secretary General Amr Moussa even argued that "the no-fly zone could not have been imposed were it not for the Arab League."<sup>211</sup> Regardless of the precise relative weights of influence of the respective actors in the Libyan conflict, it is evident that the configuration was different than in Bosnia or Kosovo and, in particular, did not include any of the conventional candidates for expanded permanent membership in the Security Council.

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This brief overview of the three case studies illustrates that the Security Council in the post-Cold War era has had sufficient resources to achieve its objectives when it reaches internal consensus on what common interests are involved in a particular context. Its ineffectiveness has been due to disagreement rather than incapacity. The distinguishing factor explaining the Security Council's successful intervention in Libya, compared with its initial ineffectiveness in Bosnia and lack of response in Kosovo, was its agreement

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207. See Leila Fadel, *Libyan Official Says Rebels May Split Their Governance*, WASH. POST, Sept. 8, 2011 ("[T]he new government is considering dividing its operations between east and west."); Kareem Fahim & David D. Kirkpatrick, *Rebels Pour Into Central Tripoli, Declaring Victory Over Qaddafi*, N.Y. TIMES, Aug. 22, 2011, at A1 ("Col. Muammar el-Qaddafi's grip on power dissolved with astonishing speed on Monday as rebels marched into the capital."); Editorial, *Qaddafi's Final Hours: Libyans' Courageous Fight Won't End Until They Build a Democracy*, N.Y. TIMES, Aug. 23, 2011 ("[W]ith rebel fighters in substantial control of Tripoli, [Qaddafi] was nowhere to be found, and his regime seemed to be collapsing.").

208. See C.J. Chivers & Eric Schmitt, *Libya's Civilian Toll, Denied by NATO*, N.Y. TIMES, Dec. 17, 2011, at A1.

209. See Rod Nordland, *Libya Counts More Martyrs Than Bodies*, N.Y. TIMES, Sept. 17, 2011, at A1.

210. Scott Wilson & Joby Warrick, *Obama's shift toward military action*, WASH. POST, Mar. 19, 2011, at A1; Jeff Zeleny, *Airstrikes In Libya; Questions Back Home*, N.Y. TIMES, Mar. 21, 2011, at A12 ("The president's national security adviser, Thomas Donilon, told reporters on Sunday that Libya was different from Bahrain and other countries where uprisings have taken place in the Middle East, particularly because the Arab League asked for intervention in Libya.").

211. Michael Slackman, *Dislike for Qaddafi Gives Arabs a Point of Unity*, WASH. POST, Mar. 22, 2011, at A12.

regarding the need to prevent humanitarian atrocities and the resulting swiftness of its action.

The case studies also illustrate the fluctuating role of various actors within the Security Council and the wider international community in establishing international peace and security during crises situations. Notwithstanding the collective potential of the P-5, actual enforcement of Security Council decisions has also relied on varying configurations of regional and local actors. The missions in Bosnia and Kosovo were led by the United States (within NATO); in Libya, by the United Kingdom and France (also within NATO); but in East Timor in 1999, Australia exercised the leadership role (within a wider United Nations mission); in all cases, regional and local actors were integral to the success of the international interventions and in effect had a *de facto* soft veto over those interventions and provided additional legitimacy to the Council's decisions.

It is difficult to predict where future crises will develop, but wherever they occur, the core capacity of the P-5 along with specific actors depending on the situation should be sufficient. Therefore, larger permanent membership of the Council would not enable it to better perform its responsibilities under the U.N. Charter across all crises; it would only increase the probability of dissensus, lengthen the time of response, and worsen the extent of harm that could have been prevented through quicker dispatch.

Thus, in a world of variable multipolarity, which actors are effective and which interests are shared will be a function of the particular policy problem. Over the past two decades, the Security Council's ability to fulfill its duties under the U.N. Charter has been driven more by the intensity of interests given that collectively it has sufficient resources to deploy. And the future is unlikely to be significantly different from the perspective of the P-5, as discussed next.

### B. *Expected Future Scenarios of the World*

As difficult and uncertain as is the process of assessing the current distribution of power within the international community, estimating future scenarios of the world is even more unpredictable. Nonetheless, plausible base scenarios can be extrapolated from past trends. Moreover, alternative possible futures can be similarly depicted based on certain assumptions of change from the base case. While it is impossible to "look into the seeds of time, [a]nd say which grain will grow and which will not,"<sup>212</sup> the objective with this type of exercise is not to forecast the future precisely, but to portray a set of potential states of the world in which the Security Council will need to exercise its responsibility to maintain international peace and security. The range of possible futures for the Council is likely to maintain its current position of influence in the world over the next three decades.

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212. WILLIAM SHAKESPEARE, *MACBETH*, act 1, sc. 3.

In collaboration with the International Futures project, the U.S. National Intelligence Council has calculated for each country a power index equal to a weighted average of a country's GDP, GDP per capita, military spending, and population.<sup>213</sup> Admittedly, such bottom-line estimates risk yielding predictions as accurate as those of the CIA official who assessed Soviet power as double that of the United States in 1977.<sup>214</sup> However, they are useful if regarded as composite proxies of the underlying resources that could be converted into power to achieve preferred outcomes depending on the particular context and interests. Given past trends, these data have been projected into the future. In addition to the base scenario of the status quo, the statistics are also calculated for four possible scenarios in which a set of assumed discontinuities would alter the underlying trends.

Table 5 below depicts the possible evolutions of power of the Security Council—based on the current P-5, with India and Japan, or with the G-4 (Brazil, Germany, India, and Japan)—in three different scenarios: Cycle of Fear, Base, and Pax Americana.<sup>215</sup> The details and assumptions underlying the individual scenarios are less relevant from the perspective of the P-5, given that their collective share of global power is expected to be relatively stable over the next thirty years—with a two-percent decrease in the first scenario (Cycle of Fear) and a four-percent point increase in the third scenario (Pax Americana).<sup>216</sup>

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213. The exact formula is: Share of Global Power = (0.8 x Population) + (1.1 x GDP at Purchase Power Parity) + (0.3 x GDP Per Capita at Purchase Power Parity) + (0.9 x Military Spending). See THE INTERNATIONAL FUTURES (IFs) MODELING SYSTEM, VERSION 6.32, <http://www.ifs.du.edu/ifs/index.aspx>.

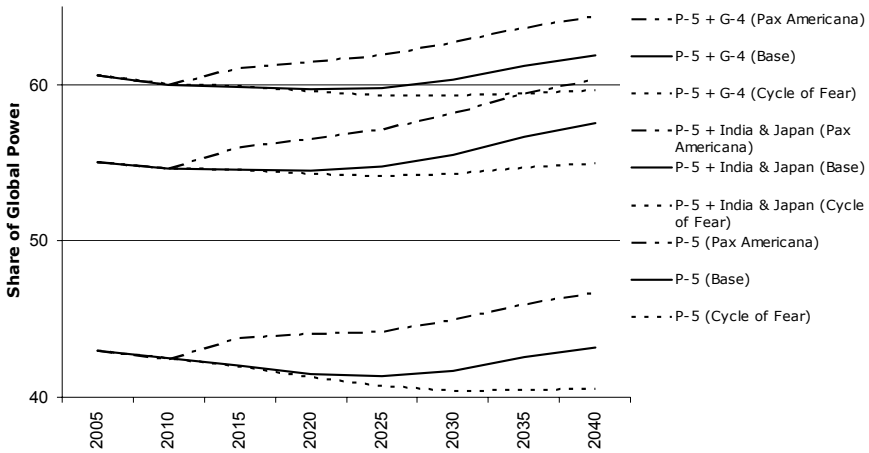
214. See CLINE, *supra* note 120 and accompanying text.

215. THE INTERNATIONAL FUTURES (IFs) MODELING SYSTEM, VERSION 6.32, *supra* note 213.

216. For a complete description of the scenarios, see NAT'L INTEL. COUNCIL, MAPPING THE GLOBAL FUTURE (2004), available at <http://www.foia.cia.gov/2020/2020.pdf>. The two other scenarios described by the NIC, Davos and Caliphate, involve trend lines that fall within the range of the Pax Americana and Cycle of Fear scenarios depicted in Table 5. The data is available at <http://www.ifs.du.edu/ifs/index.aspx>. See also NAT'L INTEL. COUNCIL, GLOBAL TRENDS 2025: A TRANSFORMED WORLD (2008), available at [http://www.dni.gov/nic/PDF\\_2025/2025\\_Global\\_Trends\\_Final\\_Report.pdf](http://www.dni.gov/nic/PDF_2025/2025_Global_Trends_Final_Report.pdf).



TABLE 5. POSSIBLE FUTURES FOR THE SECURITY COUNCIL



Thus, given that its current problem has not been insufficient capacity, the Council is likely to continue this position in the future. To be sure, additional members would increase the Council’s resource base and potential power, but most of these gains can be achieved by including only India and Japan; much lower benefits are available by expanding the Council to other members and would come at significant costs due to the increased risk of dissensus and deadlock.

C. Reforms for the Security Council

Given the importance of shared understandings regarding the Council’s purpose, progress in this regard has been made far too slowly and at great human cost over the past two decades. The trial-and-error process of clarification that led to R2P, based on normative reactions to delays (Bosnia) and inaction (Kosovo) and triggered by NATO’s illegal though legitimate intervention, is clearly unsatisfactory. While the R2P doctrine facilitated the success of the Libyan case, additional work is urgently needed.

Indeed, even when the Council reaches agreement to authorize the use of force, it cites to its general authority under Chapter VII rather than a specific article or clause within the U.N. Charter. This deficiency is unlikely due to poor legal craftsmanship, given the quality of legal counsel across the P-5, but simply due to the need to clarify contemporary understandings of the common purposes that the Security Council is supposed to serve.

Moreover, not all future challenges or threats to international peace and security will necessarily consist of humanitarian crises involving genocide or extermination, and may demand a different concept of peace and security consistent with contemporary demands of human rights and democratic values. For instance, the Council could adopt sanctions to prevent and punish

torture or human trafficking. It could adopt a declaratory resolution regarding appropriate responses to humanitarian crises not caused by war but by natural disasters. And there may be other potential items on the agenda of international peace and security, but ultimately the Council and the international community need to reach agreement on these matters.

Potentially fruitful steps in this general direction have already been taken. In September 2010, the National Intelligence Council and the EU Institute for Security Studies published the first-ever joint U.S.-EU assessment of foreign policy prospects and problems, including potential security challenges.<sup>217</sup> The collaborative effort between the two allies could serve as a harbinger of greater coordination in the future among all of the P-5 that is forward-looking and pro-active rather than merely responsive to a particular crisis.

For instance, policy-planning staffs in foreign and defense ministries across the P-5 could exchange analyses of emerging trends and concerns. The Security Council itself could consider preparing and publishing a Global Security Strategy, modeled on the U.S. National Security Strategy or the EU's European Security Strategy, as a framework document setting out common views and guidelines for decisionmaking. None of these steps, of course, would preclude debate and possible deadlock in the Council in the event of an actual crisis, but they would help identify areas of agreement, decrease mistrust and misunderstanding, and clarify issues of real contention. It is likely that they will facilitate agreement during crises, much as the R2P doctrine improved response during the Libyan crisis.

Moreover, the Council should invite to its deliberations non-state actors with capacity relevant to a particular crisis. There is already precedent for this practice, but it has not been utilized to its full advantage. For instance, the Venezuelan Ambassador Diego Arria, while Council president in 1992, held informal Council meetings with a Croatian priest, who had unique information on the Balkan conflict.<sup>218</sup> This so-called "Arria formula" meeting also served as the procedural basis for meetings with leaders of opposition movements, such as the Bosnian President Alija Izetbegovic and Kosovar President Fatmir Sejdiu. During the Rwandan crisis in 1994, non-governmental organizations such as *Médicins Sans Frontières* and the International Committee of the Red Cross proved to have the widest presence in the country and became a vital source of intelligence for the Security Council. In future conflicts, the role of such non-state actors is only likely to increase.<sup>219</sup>

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217. See NAT'L INTEL. COUNCIL & EU INST. FOR SEC. STUDIES, GLOBAL GOVERNANCE 2025: AT A CRITICAL JUNCTURE (2010), available at [http://www.foia.cia.gov/2025/2025\\_Global\\_Governance.pdf](http://www.foia.cia.gov/2025/2025_Global_Governance.pdf).

218. See generally SECURITY COUNCIL REPORT, SECURITY COUNCIL TRANSPARENCY, LEGITIMACY AND EFFECTIVENESS (Oct. 18, 2007), available at <http://www.securitycouncilreport.org/site/c.gKWLeMTIsG/b.3506555/>.

219. See generally NYE, *supra* note 116.

In addition to steps the Council can take on its own, General Assembly members will also need to become active participants in this reform process given their power to elect nonpermanent members to the Security Council.

#### D. Reforms for the General Assembly

If further agreement is reached on the Council's purpose, the Council has sufficient core resources, and is likely to maintain them in the future. But it also needs to rely on specific regional and local actors depending on the factual circumstances to effectuate its purpose. With respect to future security challenges, it is impossible to identify beforehand which actors will share interests with the P-5 and have the requisite resources to influence the solution to a problem. Fortunately, the existing structure of the Security Council has a potential built-in response mechanism to accommodate shifting areas of crisis, given that the General Assembly elects five nonpermanent members to the Council every year for two-year terms.<sup>220</sup>

Article 23 of the U.N. Charter already provides that the Assembly should pay "due regard . . . in the first instance" to a candidate country's contribution to the maintenance of international peace and security and to other U.N. purposes, with "equitable geographical distribution" being a residual consideration.<sup>221</sup> Rather than assessing a country's historic contributions, consideration should be given to a candidate's capacity to contribute to resolving emerging crises, which may also imply that several candidates from the same region are chosen. To the extent that the electoral schedule does not coincide with the timing of security crises—as is most likely to be the case—candidate countries could first contribute their resources in response to a particular problem with the expectation of being elected to the Council in the next immediate round. The strength of such promises and effectiveness of this system will depend on the General Assembly's responsibility in selecting countries based on current performance rather than other factors. In turn, the Assembly's role in exercising this power will be improved to the extent it is actively consulted by the Security Council with regard to emerging threats.<sup>222</sup>

Finally, given that some crises may last beyond the current two-year period of nonpermanent membership, the one-term limit on such membership<sup>223</sup> should be eliminated. If such amendment to the Charter is not politically feasible, then the Council could nonetheless invite the un-reelectable contributing countries to continue to participate in its discussions and

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220. U.N. Charter art. 23.

221. *Id.* art. 23, para. 4.

222. *See, e.g.,* Caron, *supra* note 2; Reisman, *supra* note 2.

223. U.N. Charter art. 23, para. 2.

decisions as non-voting members under Article 31 of the Charter,<sup>224</sup> awarding them the power and pride (even if not the vote) that Council membership is perceived to bestow.

#### IV. CONCLUSION

Expanded Security Council membership may have been unrealistic in the past, which avoided the need for careful analysis of the consequences of its expansion. Currently, even if enlargement is as politically feasible as recent developments may suggest, it may be inconsequential from the perspective of long-term effectiveness—and therefore empirical legitimacy—of the Security Council. While undoubtedly individual countries may desire permanent membership for prestige or power reasons, the international community as a whole may not necessarily have an interest in a larger Security Council. Indeed, such reform risks increased deadlock, if it is accompanied with expanded veto power or a higher voting threshold, and in any event may lull the Security Council into a false sense of comfort that it does not need to reach out to other actors given its greater representation. Given the crises since the end of the Cold War, increased permanent membership would have little, if any, impact—contrary to conventional wisdom—in enabling the Security Council to better fulfill its responsibilities under the U.N. Charter.

Ultimately, there may be too much existing political pressure and demand for an enlarged Security Council. Based on the analysis above, the international community's interest would be best served with limited formal expansion to include India and Japan. With this enlargement, the collective resources of the Council's permanent members would be similar to equilibrium levels at the founding of the United Nations.<sup>225</sup> Moreover, the Council would then most likely represent a majority of the world's population, depending on which non-permanent members were elected by the Assembly.<sup>226</sup> Nonetheless, the necessary voting requirement should be still maintained at nine (a simple majority of the expanded Council of seventeen members) to prevent increasing potential deadlock in the Council.<sup>227</sup>

For the same reason of facilitating decision on behalf of international peace and security, the veto power of the current P-5 should not be ex-

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224. *Id.* art. 31 ("Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.").

225. Compare *supra* Table 3, with *supra* Table 4.

226. See *supra* Table 4. The P-5, in addition to India and Japan, accounted for 47.82% of global population in 2010. Thus, the elected ten non-permanent members would need to account for approximately 149 million people, based on 2010 data, for the Council to collectively represent a majority of the world.

227. If additional countries are also included in the expansion, say for a total of twenty or twenty-five, the required vote for decision should be a simple majority, including the concurring votes of the P-5.

panded. The veto has outlived its original purpose of preventing great power conflict, but is unlikely to be formally eliminated given the current political reality. A decision not to expand it admittedly would introduce an initial level of inequality among the original and new permanent members—all the more glaring given the differing global size of India and Japan compared to, say, France and Russia. However, the veto would hopefully fall into desuetude over time as its use since the end of the Cold War has been relatively limited.<sup>228</sup> Indeed, while there were seventy-eight vetoes cast during the United Nations' first decade, only fifteen were cast between 1996 and 2006 (most of which related to the Middle East conflict between Israel and the Palestinian Authority).<sup>229</sup> Moreover, the P-5 have deliberated over whether to renounce the use of veto power during humanitarian crises, and could perhaps extend this commitment to other issue areas.

In any event, the Security Council should expand the *de facto* membership in its decisionmaking based on the particular problem it faces, as in the case of Libya, where it consulted extensively with the Arab League and NATO as well as the local actors. The argument for such greater membership, however, is contingent on the specific context and is a function of what power resources a given state or regional organization can provide and what interests it shares rather than based on representativeness for its own sake.

The primary focus for the international community as a whole, however, should be on identifying and clarifying the underlying purposes—as with the R2P doctrine—that the Council is intended to serve. This perspective gives primacy to consultation, debate, and persuasion among all state and non-state actors (again, recall the development of R2P), because if common interests are taken seriously, the necessary resources will coalesce and the Council will be able to fulfill the hopes and expectations of the international community. Whether international actors share common objectives in a given context is as crucial to determining outcomes and legitimacy as their collective capabilities. In turn, the scarcity or low intensity of shared interests, rather than unrepresentative membership or insufficient aggregate resources, made the Security Council ineffective during the Cold War and explains its contemporary successes and failures.

The extensive debates on Security Council reform have often juxtaposed the allegedly conflicting objectives of legitimacy and effectiveness, whereby increasing legitimacy, defined as representation, risks decreasing effectiveness, defined as the probability of reaching decisions within the Council. Yet, effectiveness of the Security Council is much more about its substantive competence to comply with its obligations under the Charter and enforce its

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228. Similarly, the use of the veto power to protect vital national interests pursuant to the Luxembourg Compromise fell into desuetude within the Council of the European Union. See Szewczyk, *supra* note 32.

229. See THE UNITED NATIONS SECURITY COUNCIL AND WAR, *supra* note 2, at 690.

decisions,<sup>230</sup> rather than its procedural ability to gather the required number of votes for a decision. Legitimacy, in turn, depends not on representation *per se*, but on the extent to which, empirically, a decision is consistent with shared understandings of permissible conduct within the international community.

Viewed in this manner, the Council can enhance both its legitimacy and effectiveness by clarifying its prospective common interests through resolutions and framework documents and involving in its deliberations regional and local state and non-state actors. Thus, its reform should be based not on expanded permanent membership, but on inclusive contextual participation in decisionmaking. As the Chinese Ambassador to the United Nations stated:

Security Council reform is a complicated and delicate engineering project, involving the interests of 192 Member States. To achieve the objectives of the reform, there should not only be the resolve to strive for progress, but also a flexible and pragmatic approach that accommodates the interests of all parties and stresses democratic consultation. Only in this way can a solution be found that bridges the differences of all parties, and serves the common and long-term interests of all Member States. And only in this way can the outcome of the reform be sustainable and full of vigor and vitality.<sup>231</sup>

Such a pragmatic approach underlies this Article, and hopefully will find support in the Security Council and the General Assembly.

This analysis has implications for other international institutions besides the Security Council. Indeed, the issue of the Council's reform is emblematic of a wider debate over the past two decades over the legitimacy, as distinct from the legality, of international institutions and international decisions. Scholars have assessed the legitimacy of global governance institutions generally<sup>232</sup> and particular institutions such as the EU,<sup>233</sup> World Trade Organi-

230. See, e.g., Murphy, *supra* note 2.

231. Statement of Chinese Ambassador Zhang Yesui, *supra* note 28, at 655–56.

232. See, e.g., IAN CLARK, INTERNATIONAL LEGITIMACY AND WORLD SOCIETY (2007); THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001); Daniel Bodansky, *The Legitimacy of International Governance*, 93 AM. J. INT'L L. 604 (1999); Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1 (2009); Joseph H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 ZAÖRV 547, 551 (2004).

233. See, e.g., DAVID BEETHAM & CHRISTOPHER LORD, LEGITIMACY AND THE EUROPEAN UNION (1998); GIANDOMENICO MAJONE, EUROPE AS THE WOULD-BE WORLD POWER: THE EU AT FIFTY (2009); FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? (1999); DEBATING THE DEMOCRATIC LEGITIMACY OF THE EUROPEAN UNION (Beate Kohler-Koch & Berthold Rittberger eds., 2007); Andrew Moravcsik, *Is there a "Democratic Deficit" in World Politics? A Framework for Analysis*, 39 GOV'T & OPPOSITION 336 (2004).

zation,<sup>234</sup> International Monetary Fund,<sup>235</sup> International Criminal Court,<sup>236</sup> administrative institutions,<sup>237</sup> international investment arbitration,<sup>238</sup> and environmental regimes.<sup>239</sup> These wide-ranging studies demonstrate that the tension between old rules and new norms extends beyond the Security Council to many international institutions. Yet, debates surrounding Security Council reform have not drawn on the insights and lessons learned from developments in other international organizations.

For instance, both the EU and the Security Council are relatively non-hierarchical political systems, with no focal concentration of control and with a diffusion of resources, particularly as compared with nation-states. Yet, assessments of the two institutions have occurred on parallel research tracks without synergies between the intellectual efforts, notwithstanding the extensive potential for mutually-beneficial exchange of perspectives.<sup>240</sup> Knowledge of the EU and its internal debates is invaluable for purposes of assessing Security Council reform, as it helps avoid some of the same intellectual pitfalls that bedeviled analyses of the EU and points to potential solutions that have worked for the EU and may similarly aid the Council.

Hopefully this Article provides a comprehensive analysis of how the Security Council can serve as a model for the study of other decentralized governance institutions, as well as specific international decisions. For instance, some observers have suggested that the G-20, in addition to serving as the premier forum for international economic cooperation, should expand its agenda to include items such as nonproliferation and terrorism. Others have recommended that the U.N. Climate Change Conference, which enjoys

234. See, e.g., DEBORAH Z. CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM* (2005); ROBERT HOWSE, *THE WTO SYSTEM: LAW, POLITICS & LEGITIMACY* (2007); JOHN H. JACKSON, *SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW* (2006); Jeffrey L. Duff, *The WTO's Legitimacy Crisis: Reflections on the Law and Politics of WTO Dispute Resolution*, 13 AM. REV. INT'L ARB. 197 (2002); Joseph H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 13 AM. REV. INT'L ARB. 177 (2002).

235. See, e.g., Hector R. Torres, *Reforming the International Monetary Fund: Why Its Legitimacy Is At Stake*, 10 J. INT'L ECON. L. 443 (2007).

236. See, e.g., Lee A. Casey & David B. Rivkin, Jr., *The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties*, 44 VA. J. INT'L L. 63 (2003); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510 (2003); Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court: A Liberal Defence*, 4 J. INT'L CRIM. JUST. 765 (2006).

237. See, e.g., Rüdiger Wolfrum, *Legitimacy of International Law and the Exercise of Administrative Functions: the Example of the International Seabed Authority, the International Maritime Organization (IMO) and the International Fisheries Organization*, 9 GER. L.J. 2039, 2039 (2008).

238. See, e.g., Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law*, 9 CHI. J. INT'L L. 471 (2009); William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 199 (2008); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

239. See, e.g., Petra Lea Láncoš, *Flexibility and Legitimacy: The Emissions Trading System Under the Kyoto Protocol*, 9 GER. L.J. 1625 (2008).

240. See, e.g., Szewczyk, *supra* note 32; Bart M.J. Szewczyk, *Enlargement and Legitimacy of the European Union*, 30 POLISH Y.B. INT'L L. 131 (2011).

near universal participation on the part of states and includes many non-state actors, should limit its membership to reach agreement on climate change. Could and should the Asia-Pacific Economic Cooperation forum serve as the institutional basis for closer Chinese-American relations beyond the strategic and economic dialogue between the two countries? How can international investment regimes be improved?

In the end, any conclusions on these issues will never be precise nor without uncertainty, since international law is complex and changing. However, such analyses will be better than the existing alternatives in guiding and improving decisionmaking.